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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

SIDNEY HERSH YATEMAN, APPELLANT

v.

BARBARA LEE YATEMAN, APPELLEE

ON APPEAL FROM THE COURT OF APPEAL

OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION THREE

JURISDICTIONAL STATEMENT

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IN PROPRIA PERSONA

OCTOBER 11, 1982

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SIDNEY HERSH YATEMAN, Appellant

v.

BARBARA LEE YATEMAN, Appellee

ON APPEAL FROM
THE COURT OF APPEAL OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION THREE

JURISDICTIONAL STATEMENT

Appellant Sidney Hersh Yateman appeals from the final judgment of the Court of Appeal of California, First Appellate District, Division Three, following the California Supreme Court's denial of his petition for hearing.

QUESTIONS PRESENTED

I. Whether the Lower Court can assert res judicata and consider it a "final judgment" when the State Court retains jurisdiction over a federal benefit.

II. Whether the State Court judgment is immune from collateral attack when, as here, the State Court did not have subject matter jurisdiction to divide Appellant's Army retired pay because of Federal pre-emption.

III Whether the system of military retirement benefits established by Congress as upheld in McCarty v. McCarty, (subsequently changed by Congressional Legislation) is retroactive to those cases pending appeal prior to McCarty being granted a hearing by this Honorable Court.

TABLE OF CONTENTS

Questions Presented.....ii

Table of Contents.....iii

Table of Authorities.....iv

Opinions Below.....1

Jurisdiction.....1

Statutes and Constitutional Provisions Involved.....2

Statement of the Case.....3

The Questions are Substantial:

A. Finality.....9
B. Former Spouses' Protection Act.....14
C. Res Judicata Not Applicable.....15
D. Collateral Attack Permitted.....18
E. California Precedents Unpersuasive..29
F. No Voluntary Stipulation Given.....38

Conclusion.....44

Certificate of Service.....45

Appendices:

A. Court of Appeal Opinion Below (49751)45
B. Trial Court Decrees Below.....58
C. Court of Appeal Opinion Below (46564)67
D. California Supreme Court Minutes.....77
E. Notice of Appeal.....78
F. Constitutional Provisions & Statutes.80

TABLE OF AUTHORITIES

CASES CITED:

Adam v. Sanger
303 U.S. 59 (1938).....30

American Mannex Corp. v. Rozands
462 F. 2d, 688 (5th Cir. 1972).....30

Carter v. Carter
19 Cal. App. 3d 479 (1971).....41

Chevron Oil Co. v. Huson
404 U.S. 97 (1971).....31,32,35

Commissioner of Internal Revenue v. Sunner
333 U.S. 591 (1948).....16,18,27

Cromwell v. County of Sacramento
94 U.S. 351 (1877).....19

Dahnke Walker Milling Co. vs. Bondurant
257 U.S. 282 (1921).....2

DiGenova v. State Board of Education
57 Cal. 2d 167 (1962).....10

Durfee v. Duke
375 U.S. 106 (1963).....20,21

Erspan v. Badgett
657 F. 2d 550, rehearing denied,
659 F. 2d 26 (5th Cir. 1981).....,29,31

Ex Parte Buckhanan
626 S.W. 2d 65 (1981).....23,29,30,31,38

Federated Department Stores, Inc. v. Moitie
453 U.S. ____ (1981).....19,20,32

Free v. Bland
369 U.S. 663 (1962).....35

Gibbons v. Ogden
9 Wheat. 1 (1824).....35

Hisquierdo v. Hisquierdo
439 U.S. 572 (1979).....10,12,14,15

In Re Marriage of Fellers
125 Cal. App. 3d 254 (1981).....29

In Re Marriage of Fithian
10 Cal. 3d 592, cert. denied 419 U.S.
825 (1974).....34

In Re Marriage of Jacanin
124 Cal. App. 3d 67 (1981).....36,37

In Re Marriage of Mahone
123 Cal. App. 3d 17 (1981).....29

In Re Marriage of Milhan II
97 Cal. App. 3d 41 (1979).....6,42

In Re Marriage of Sheldon
124 Cal. App. 3d 371 (1981).....11,29,31,
32,35,36,37,38

Jackson v. Desoto Parish School Board
585 I. 2d 726 (5th Cir. 1978).....26

Kalb v. Feuerstein
308 U.S. 433 (1940).....23,24,25,32,36

Key v. Wise
629 F. 2d 1049 (5th Cir. 1980).....21

Market St. Ry Co. v. R.R. Comm.
324 U.S. 548 (1945).....9

McCarty v. McCarty
453 U.S. ____, 101 S. Ct. 2728,
(1981).....PASSIM

Moch v. East Baton Rouge Parish School
Board
548 F. 2d 594 (5th Cir. 1977) cert. den.
434 U.S. 859 (1977).....28

Parnell v. Rapides Parish School Board
563 F. 2d at 185.....27

People v. Trujillo
67 Cal. App. 3d 547.....43

Perini v. Perini
225 Cal. App. 2d 399 (1964).....43

Ridgway v. Ridgway
453 U.S. ____, (1981).20,21,25,30,32,35,36

Sanserino v. Slamberger
245 Cal. App. 2d 630 (1966).....42

Sime v. Malouf
95 Cal. App. 2d 88 (1949).....38

State Farm Mutual Automobile Insurance Co. v. Duel
324 U.S. 154 (1945).....27

Traders & General Ins. Co. v. Pacific Employers
130 Cal. App. 2d 158 (1955).....39

STATUTES CITED:

37 U.S.C. § 701 2,17,33

Title X Uniformed Services Former Spouses' Protection Act (Sep. 1982).....2,14

Cal. Civ. Code § 4800 1,2,4

Cal. Civ. Procedure Code § 473 6,7

OPINIONS BELOW

The Court of Appeal issued its second unreported opinion on May 12, 1982. (App. A, infra.) The first unreported opinion was issued on November 29, 1979. (App. C, infra.) The California Supreme Court rendered no opinion when it denied Appellant's Petition for hearing on July 22, 1982. (App. D, infra.)

JURISDICTION

The California Court of Appeal entered its judgment on May 12, 1982. The Supreme Court of California denied Appellant's petition for hearing on July 22, 1982. A notice of appeal to this Court was duly filed in the California Court of Appeal on August 4, 1982.

This appeal is being docketed within 90 days of the California Supreme Court's denial of Appellant's petition for hearing.

Appellant has argued below that § 4800(a) of the California Civil Code, as

it purports to characterize federal military retirement pay as community property, was repugnant to federal statutes and had been pre-empted by federal statutes and therefore was invalid under the United States Constitution. The California courts upheld the statute's validity.

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(2). Dahnke Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921); McCarty v. McCarty, 453 U.S. ____ (1981).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the following statutes:

37 U.S.C. § 701 (a)

California Civil Code § 4800(a)

Title X Uniformed Services Former Spouses' Protection Act (Sep. 1982)

These statutes, along with Article VI, clause 2 of the United States

Constitution, appear in Appendix F.

STATEMENT OF THE CASE

The parties were married on June 14, 1959. Appellant commenced active duty in the U. S. Army on June 3, 1959. On March 13, 1977, Appellee filed for divorce in the Monterey superior court. The parties were divorced by interlocutory judgment entered on November 29, 1978. The superior court entered final judgment of divorce on June 13, 1979. Appellant retired from the army on June 1, 1982, after twenty-three years of active duty.

Appellant made a motion to the Trial Court in December, 1979, to set aside that portion to interlocutory and final decrees in which jurisdiction was retained over military retirement benefits by characterizing them as community property. At the time, the Appellant was an Army officer on active duty. The Appellant had never agreed to divide his retirement benefits and did not voluntarily or freely

stipulate to it at the time of interlocutory decree, one year before his rights vested. In his petition, the Appellant stated he was a Florida domiciliary. Although he was in California by virtue of his military orders, he had been and still remains a Florida domiciliary.

The Appellee claimed a portion of the husband's right to retirement pay under community property concepts established by Section 4800 of the Civil Code although at the time of her petition for dissolution on March 13, 1978 she was a registered voter in Florida and had signed her California Income Tax Return in January, 1978 that she was a Florida domiciliary. Appellant waived jurisdiction because of his military duties.

Appellant claimed his future military benefits as separate property and refused to claim them as community property on the initial financial

declaration on March 24, 1978 filed April 13, 1978 in the trial court. A copy was not made part of the Clerk's Transcript in the first appeal in Case #46564 but was provided to the Court of Appeal, attached to Appellant's petition for rehearing in Case #49751. Appellant was required to sign a revised financial statement which listed military benefits as community property, over objection, because he was told "it was the Law" and he would have to do it. Even as Appellant signed the revised financial declaration, he told Appellant's previous attorney of record that he was not in agreement with the law and would not stipulate voluntarily to such a law. In fact, he stated he wanted to take the matter to the U. S. Supreme Court for resolution. When other matters in Case #46564 were appealed (1st Appeal) Appellant insisted on including the military benefit issue also but attorney said it could not be done because the law

required otherwise. Hence no appeal was made on this issue at that time as noted by Court of Appeal decision in Case #49751 (2nd Appeal).

After the decision In Re Marriage of Milhan II (1979) 97 Cal. App. 3d 41, Appellant became aware that it was not illegal to claim separate property on military entitlements. Appellant obtained briefs from Commander Milhan and requested that Appellant's attorney again correct the matter of stipulation. Attorney decided to use California Code of Civil Procedure Section 473 to submit the material provided to him by Appellant. Attorney had argued that since all military entitlements would go to Appellee if Appellant became deceased during the period of interlocutory decree, that it was the date of final decree which was the critical date. The motion based on the California Civil Procedure Section 473 was timely filed within six (6) months of the

final decree. The Court of Appeal in Case #49751 stated that the motion pursuant to California Civil Procedure Section 473 was not timely filed since it was submitted more than six (6) months after the interlocutory decree.

Ten (10) months after the filing of the Appellant's Opening Brief, the United States Supreme Court granted a hearing on direct appeal in McCarty v. McCarty

Before the Court of Appeal, Appellant argued that various Federal enactments relating to army retirement pay justified the conclusion that Federal law had pre-empted California's community property scheme insofar as an allocation of army retirement pay to a non-employee spouse was concerned.

In this regard, Appellant laid stress on the significant developments in applicable case law between the date of the filing of Appellant's Reply Brief and the date set for oral argument. Such

developments were documented in the Supplemental Points and Authorities filed on April 19, 1982.

The decision of the Court of Appeal was rendered on May 12, 1982. The full text of the opinion is set forth in Appendix A. In its decision, the Court decided the issue of the merits against the Appellant. As to the stipulation issue, it held Appellant was subject to res judicata. With respect to the Federal pre-emption argument, the Court of Appeal ignored any reference to it except to say that McCarty does not apply retroactively. The court neglected to discuss the federal issue of pre-emption. It never discussed finality with regard to reservation of jurisdiction over a federal property right. It failed to respond to the involuntary stipulation issue. Lastly, it denied an application for permission to file a motion to remand for an evidentiary hearing on the voluntariness of the

stipulation and it denied a petition for rehearing.

The Appellant petitioned for a hearing in the Supreme Court of California, reiterating his previous arguments and pointing out that the Court of Appeal's decision in the case at bar conflicted with McCarty v. McCarty, 453 U.S. _____(1981). On July 22, 1982, hearing was denied in the California Supreme Court.

THE QUESTIONS ARE SUBSTANTIAL

The questions raised warrant plenary consideration for six reasons:

A. TECHNICALLY, NO FINAL JUDGMENT HAS YET BEEN ENTERED IN THIS CASE.

"Finality" in this sense is purely a creature of U.S. Supreme Court rules and practice does not embody any state law concept pertinent here. See Market St. Ry. Co. v. R. R. Comm., 324 U.S. 548, 551 (1945).

Here, the situation is compelling for not applying a mere "rule of procedure" (see Di Genova v. State Board of Education, 57 Cal. 2d 167, 179 (1962) to evade a determination of this case on the merits. In the intervening period since the initial appeal the United States Supreme Court has decided Hisquierdo and subsequent to the second appeal, it decided McCarty. Also, Congress has now enacted federal statutes which, have caused a marked change or clarification in the supreme law of the land (Art. VI, CL. 2, U.S. Const.). To apply res judicata, as did the court below, in such circumstances would be as legally inappropriate as it would be unjust and therefore, it is in the interest of expeditious and fair administration of justice to review the issues presented in light of McCarty and rather recent federal statutory enactments. The ends of justice require recognition of interests other

than those of mere "expediency."

In the case before this court, Appellant made a motion in the trial court not after appeal was granted to McCarty but ten (10) months before an appeal was granted to McCarty. (See In Re Marriage of Sheldon, 124 Cal. App. 3d 371 (1981). This timely action reenforces Appellant's claim that continued enforcement of the trial court stipulation would be unjust in light of the U. S. Supreme Court decision in McCarty.

Sheldon held, in part, that McCarty should not be applied to cases not final on appeal unless the military spouse requested that the trial court "reserve jurisdiction" on the character of the property interest in the pension or timely raised and briefed the Federal pre-emption issue on appeal.

If the criterion for retroactive application of McCarty is finality of the prior judgment, then it should make no

difference whether a reservation of jurisdiction was reserved by Appellant or respondent, or, for that matter, what issue is specified in the order of reservation. The emergent fact is that the judgment is not final. Something remains to be done. It would be inequitable to conclude that the judgment is final as to all other matters. Often the terms of a judgment are so interdependent that amendment or substitution of one term, will necessarily require review of the others. If the judgment is not final for all purposes, it is still pending and by its terms, McCarty is applicable to the judgment in toto.

The Hisquierdo case in 1979 told California it could no longer divide Railroad Retirement Act benefits as community property. The implication was clear that California might not have the power to divide military retired pay as community property.

In the case before this court it should be noted that the Appellant was never a resident of California, was on active duty in the military service, and subject to California jurisdiction only by virtue of his military assignment within the state. At the time of the interlocutory decree on November 15, 1978 Appellant's military retirement benefits had not even vested (vested June 3, 1979). Appellant completed active duty military service on June 1, 1982. Even as of this date no division of military benefits has been made. The state court has merely retained jurisdiction which, in light of the McCarty case must be void on its face.

Furthermore, Appellant requested that this court in reviewing this case on appeal as it relates to the community vis-a-vis separate property nature of military retired pay consider the following:

The application of the federal standard;

Address the federal issues;

Discuss the federal intent;

Discuss state policy as it conflicts with the federal standard;

Address the comments of the U. S. Supreme Court made in Hisquierdo regarding California courts ignoring the 1977 Social Security Legislation.

None of these issues were addressed except to mention that McCarty was not deemed retroactive. The decisional basis upon which the Court of Appeal's decision rests in this case is palpably inadequate.

B. ONLY THE CONGRESSIONAL LEGISLATION PASSED IN SEPTEMBER, 1982 (TITLE X UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT), ENABLES STATES TO DIVIDE MILITARY RETIREMENT PAY AS OF FEBRUARY 1, 1983 BUT NOT FOR PRE McCARTY CASES.

The recent bills passed in Congress in September, 1982, which permit states to divide military retirement benefits

between both spouses now changes the Congressional intent. It has been long recognized that Congress can change the rules for benefits at its discretion as it has done before. This matter was thoroughly discussed in Hisquierdo and McCarty by the U. S. Supreme Court, However, until such bills were actually passed by the Congress, the military benefits were separate property. The very fact that such bills were needed to change the rules only serve to further the argument that the California Supreme Court has ignored Congressional legislation heretofore and therefore its ruling that military retirement benefits are community property is void on its face because it interfered with the objectives and requirements of the military pay retirement system.

C. NO RES JUDICATA DEFENSE CAN BE ASSERTED BY THE COURT, BECAUSE, PROPERLY VIEWED, APPELLANT IS

PURSUING A NEW CAUSE OF ACTION AS A DEFINITIONAL MATTER.

The defense of res judicata is properly raised only when the same cause of action is asserted between the same parties to a prior argument. If these two (2) criteria are satisfied, finality may attach to issues litigated in the prior action; finality may also attach to issues which could have and should have been litigated but were not.

If the same parties are involved in a dispute, but the cause of action is not the same, principles relating to collateral estoppel (but not to res judicata) apply. Finality will attach to issues actually litigated in the prior litigation; but finality will not attach to issues that were not actually litigated. Commissioner v. Sunnen, 333 u.s. 591, 68 S. Ct. 715, 92 L. Ed. 898 (1948).

Here, the technical distinction

between res judicata and collateral estoppel appears to be significant. The issue of federal pre-emption and the subject matter jurisdiction of the Supreme Court was neither presented in 1978 to the Court nor considered by it. The specific applicability of the anti-assignment statute applicable to army retired pay, 37 U.S.C. Section 701 (a) was not considered by the state court. Nor did the state court in 1978 consider whether army retired pay represented reduced pay for current reduced services.

If as Appellant contends -- and the host of federal cases have determined -- his retired pay represented reduced pay for current services, and such pay, as he receives it from the army, is his separate property and may not be treated as community property to the extent that it is earned after the dissolution of the marital community.

Since the cause of action is not the

same in these proceedings as in the court proceedings in 1978, only collateral estoppel should apply. And collateral estoppel is inadequate to bar a consideration here of the issues not litigated in the 1978 action.

D. ASSUMING THE DISPUTE BETWEEN THE PARTIES TO THE 1978 JUDGMENT PROPERLY INVOLVES A RES JUDICATA ISSUE, THE COURT JUDGMENT IS NOT IMMUNE FROM COLLATERAL ATTACK.

Collateral attack is proper where, as here, the court did not have subject matter jurisdiction to divide Appellant's army retired pay because of federal pre-emption.

Res judicata is a defense on the merits to a cause of action; it denotes that a prior judgment, rendered on the merits, is a bar to a subsequent action between the same parties upon the same claim or demand. Commissioner v. Sunnen,

Cromwell v. County of Sacramento, 94 U.S. 351, 352-353, (1877).

The prior decision cannot be denied res judicata effect (or immunity from collateral attack) in subsequent litigation between the same parties on the same cause of action, merely because the first decision may have reached an erroneous conclusion. So much has been reaffirmed by the recent decision of the Supreme Court in Federated Department Stores, Inc. v. Moitie, 453 U.S. ____, (1981). Moitie rejects the view -- which had enjoyed substantial prior support in the case law -- that relief from a prior judgment can be grounded upon strong equitable grounds alone -- i.e., "simple justice."

Appellant's challenge to the subject matter jurisdiction of the state court is based upon federal pre-emption grounds. A collateral attack based upon such ground remains a valid method by which to

challenge a prior state court judgment. The vitality of this doctrine has not been diminished or affected by Moitie. The doctrine -- given its clear articulation in Kalb v. Feuerstein, 308 U.S. 433, (1940) -- has been reaffirmed by the Supreme Court, in a family law context in a post-McCarty case, Ridgway v. Ridgway, 453 U.S. ____, (1981).

A determination by a state court that it has jurisdiction of the case presented to it is generally conclusive, at least when the jurisdictional question has been fully litigated. In Durfee v. Duke, 375 U.S. 106, (1963), "the Court stated the 'general rule' that '(a) judgment is entitled to full faith and credit -- even as to questions of jurisdiction -- when the (second) court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment'." 375 U.S. at 111, as quoted in

Key v. Wise, 629 F 2d 1049, 1056 (5th cir. 1980). The Durfee court conceded, however, that this general rule of finality of jurisdictional determination is subject to an exception: the "(d)octrines of federal pre-emption...may in some contexts be controlling." 375 U.S. at 114.

With a collateral attack on the state court judgment on the ground that the state court did not have jurisdiction over the subject matter by virtue of federal pre-emption, that overriding consideration must engage the attention of the court before giving finality to the prior state court decision.

In its analysis, this Honorable Court in the Ridgway case gave much attention to an anti-attachment statute that applied to servicemen's life insurance proceeds. Using this provision to support the federal pre-emption argument, the court swept away the earlier injunction

requiring the husband to retain the insurance policies in favor of the children. The court even disregarded the stipulated property settlement reached by the parties which had been the basis of the Maine divorce decree:

> We find nothing to indicate that Congress intended to exempt claims based on property settlement agreements from the strong language of the anti-attachment provision.
> -453 U.S. at ____, 102 S. Ct. at 58, 70 L. Ed. 2d at 52 (footnote omitted).

McCarty v. McCarty arose as a direct attack upon the judgment of a California divorce court; the Supreme Court did not deal with any question concerning the res judicata effect to be given to a prior judgment. The McCarty court found a sufficient threat of "grave harm to 'clear and substantial' federal interests" to require that conflicting state laws giving effect to state public policy concerns based upon community property principles

must give way. "State courts are not free to reduce the amounts that Congress has determined are necessary for the retired member."

McCarty has been applied retroactively in an intelligent analysis and application based upon the federal pre-emption principles set out in Kalb v. Feuerstein, supra. A Texas Court of Appeals in Ex Parte Buckhanan, 626 S.W. 2d 654 (1981), considered a collateral attack on a 1977 Texas divorce judgment dividing Air Force retired pay in accordance with Texas community property law. After discussing the McCarty decision, the Court noted as follows:

> In determining how McCarty affects the judgment under collateral attack before us, it is essential to focus upon what the court said. McCarty pre-empted nothing: it only considered, determined and announced what Congress had already done.
>
> ***

> Respondent argues that the judgment under attack in the case before us is at worst erroneous, and not void, and that the relief sought by relator is thus barred by the doctrine of res judicata. We cannot agree. The court pointed out in McCarty that when Congress enacted the military retirement system, it acted pursuant to its express constitutional power over the armed forces; and the court observed further that "in no area had the court accorded Congress greater deference than in the conduct and control of military affairs." -- U.S. at ____, 101 S. Ct. at 2743, 69 L. Ed. 2d at 608. When Congress has exercised its plenary power to a particular subject, judgments of state courts purporting to exercise jurisdiction over the pre-empted subject are "nullities and vulnerable collaterally." Kalb v. Fuerstein, 308 U.S. 433, 436, 60 S. Ct. 343, 344, 84 L. Ed. 370 (1949).

The analysis and decision in this Texas court opinion should commend itself to this Court. This analysis is but the logical application of federal pre-emption principles set down in McCarty; it will sustain a collateral attack of the prior

state court judgment in this case in a manner made necessary by Kalb v. Feuerstein, supra. and Ridgway v. Ridgway, Supra.

Additionally, collateral attack is proper on a permanent injunction where changed circumstances exist since the prior judgment. Appellee will soon bring a Petition to Compel compliance with the 1978 state court judgment. The 1978 judgment was in the form of a permanent injunction against Appellant directing him, at a point in the future when he would retire from the Army, to pay to petitioner a portion of each monthly pay of Army retirement pay in a stated percentage.

The injunctive command directed by the state court to Appellant was not and could not have been set out as a simple money judgment. The amount Appellant might secure in the future from the Army as retired pay was conjectural: Appellant

might not live long enough to secure any Army retired pay or he might have left the Army before his benefits vested. Further, the amount may be altered from time to time, since retired pay derives from statutory provisions alone and is not based upon contract principles. Finally, the dollar amount of retired pay changes because of the application of cost of living increases which affect the amount of retired pay the Appellant is to receive.

In Jackson v. DeSoto Parish School Board, 585 F. 2d 726 (5th cir. 1978), a prior permanent injunction reapportioning the school board was challenged. Defendants contended that the prior injunction was immune from attack. The Court Disagreed:

> A challenge to the constitutionality of a court-ordered reapportionment plan is not, in either case, precluded by principles of res judicata or collateral estoppel. It has long been established that res judicata

is no defence where, between the first and second suits, there has been an intervening change in the law or modification of significant facts creating new legal conditions. See, e.g., Commissoner of Internal Revenue v. Sunn, 1948, 333 U.S. 591, 599-602, 68 S. Ct. 715, 720-21, 92 L. Ed. 898, 906-08;

State Farm Mutual Automobile Insurance Co. v. Duel, 1945, 324 U.S. 154, 162, 65 S. Ct. 573, 577, 89 L. Ed. 812, 819. In these cases, the operation of the preclusion doctrines would result in unequal treatment of similarly situated individuals, some of whom have the misfortune to have sought legal redress at an earlier phase of legal developments.

Such inequity becomes particularly intolerable when, as here, constitutional rights are involved. This court has thus been unwilling to bar subsequent challenges to apportionment schemes, seemingly constitutional when instituted by the court, but apparently inadequate under the rapidly changing jurisprudence in this area. (citations omitted). As Judge Wisdom wrote in Parnell v. Rapides Parish School Board, supra, 563 F. 2d at 185, "Faced with changing law, courts hearing questions of constitutional right cannot be limited by

> res judicata. If they were, the Constitution would be applied differently in different locations.

See also, Moch v. East Baton Rouge Parish School Board, 548 F. 2d 594 (5th cir. 1977) cert. den. 434 U.S. 859 (1977).

Appellant should not be barred by preclusion principles from showing that an injunction should be modified or dissolved in light of changing circumstances, unexpected burdens or the injunction's failure to achieve the intended benefits.

The application of McCarty to these principles is manifest. An injunction, permanent in nature, requiring Appellant in this case to make payments to petitioner of his Army retired pay, long after the Supreme Court has declared on constitutional grounds that federal statutes bar such a result, is just such a changed condition adequate to modify the state court's permanent injunction.

E. CALIFORNIA CASE PRECEDENTS AGAINST COLLATERAL ATTACK ARE WEAK, DISTINGUISHABLE AND UNPERSUASIVE.

The California courts provide cases to support its position In Re Marriage of Sheldon, 124 Cal. App. 3d 371, (1981); In Re Marriage of Mahone, 123 Cal. App. 3d 17, (1981) and In Re Marriage of Fellers, 125 Cal. App. 3d 254, (1981).

Appellant is also aware of Erspan v. Badgett, 657 F. 2d 550, rehearing denial, 659 F. 2d 26 (5th Cir. 1981) decisions which consider the possible retroactive application of McCarty. Unlike Ex Parte Buckhanan, supra,all four (4) reject the power of McCarty to disturb the finality of prior state court dissolution decrees dividing military retired pay benefits.

Each of these four (4) decisions considers the collateral attack on res judicata solely (or largely) as a state law issue. None considers the doctrine of

federal pre-emption as a possible justification for a collateral attack on the prior state court judgment. No case among these four (4) even remotely pursues the analysis followed in Ex parte Buckhanan, supra, none even mentions Kalb, Ridgway, or the Restatement of Judgments.

It is clear that this court must consider the retroactive application of McCarty as a matter governed by federal law. The extent to which a federal court must attach conclusive effect to prior state court proceedings is a federal question. Adam v. Sanger, 303 U.S. 59, 64; (1938); American Mannex Corp. v. Rosands, 462 F. 2d 688, 689 (5th Cir. 1972). Indeed, since McCarty is a case involving federal pre-emption of state law, it is surprising that the four (4) cases considering McCarty do not apply federal law in determining whether conclusive effect should be given to prior, pre-McCarty, state court proceedings dividing

military retired pay.

But further: If Erspan presumes to follow Texas state law, the authoritative statement on Texas law is found in Ex Parte Buckhanan, supra, which Appellant now commends to the attention of this court. Moreover, Texas cases adopted the federal pre-emption rationale without having been bludgeoned by McCarty to do so.

By far the most interesting of the four (4) cases considering McCarty is In Re Marriage of Sheldon, supra.

The Sheldon Court considered the retroactivity issue within the context of Supreme Court decisions, most particularly, Chevron Oil Co. v. Huson, 404 U.S. 97, (1971).

Huson is not, however, a federal pre-emption case, nor are any of the other Supreme Court cases cited by the Sheldon Court.

It is peculiar that Sheldon chose Huson at all as the applicable test, since Kalb would have been more appropriate. (Ridgway, argued before the Supreme Court on October 7, 1981, was decided one (1) month after Sheldon). Huson is in any event largely superseded by Federated Department Stores, Inc. v. Moitie, supra, decided in June, 1981. Moitie appears to limit Huson substantially; if the Sheldon Court had considered Moitie, it would, no doubt, have relied upon it without even considering Huson.

Sheldon looks to California cases that hold a military pension constitutes community property; Sheldon makes no effort to look at relevant federal law to determine whether the decision in McCarty had been foreshadowed by federal law. In fact, it had:

1. The Supreme Court of the United States has considered the conflict between federal law and state community property

principles six (6) times this century, and in each such confrontation federal law has been held to pre-empt the application of state community property principles.

2. In several of these confrontations, a decisive -- or at least important -- element for decision was the existence of a federal anti-assignment or anti-attachment statute which was held to pre-empt the application of state community property principles.

Army and Air Force retired pay is also subject to an anti-assignment statute -- 37 U.S.C. Section 701 (a) and (c). This section had already been interpreted by two (2) federal courts of appeal and one (1) state Supreme Court as voiding all assignment of interests in military pay. The McCarty Court had little difficulty in extending the anti-assignment views of its prior pre-emption decisions to Section 701. See McCarty at 101 S. Ct. 2739-2740, 69 L. Ed. 2d 603-604.

3. Sheldon considers the "well-settled California precedent holding a military pension constitutes community property" to be antediluvian in origin. But that is not so. The application of community property law to military retired pay to be received by the servicemen is a fairly recent state law development. In Re Marriage of Fithian, (1974) 10 Cal. 3d 592.

4. Finally, in terms of federal law, the decision in McCarty was clearly foreshadowed by the very long line of federal cases holding that military retired pay is but reduced payment for reduced services. Although McCarty pulls back from resting its holding on this ground, 453 U.S. ____, the McCarty Court points out that state courts were on notice that this doctrine may of itself defeat a state court's application of community property principles.

But Sheldon sees the universe only through California eyes. The cardinal error in Sheldon is that the Court fails to note that "(t)he relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail." Ridgway v. Ridgway, supra, at 102 S. Ct. 55, 70 L. Ed. 2d at 48-49, quoting from Hisquierdo, 439 U.S. 572, at 581. See also, to same effect, Free v. Bland, 369 U.S. 633, 666 (1962); Gibbons v. Ogden, 9 Wheat. 1, 210-211 (1824).

It is clear therefore that the Sheldon Court had little reason to conclude that the first test set out in Huson, as to whether McCarty's resolution concerning military pay was foreshadowed by appropriate law (i.e., by federal law), could be answered in the negative.

The second test in Huson is also answered inappropriately by Sheldon. The

"history...purpose and effect" of the rule in McCarty clearly mandates retrospective operation. A finding of federal pre-emption forces state law to give way, at a necessary consequence of the Supremacy Clause of the national Constitution. If in McCarty federal pre-emption was required because grave damage is caused to federal interests, the state court never had jurisdiction to take away from the military retiree his future retired pay. That alone should end the inquiry. That is the teaching of Kalb and Ridgway. But the Sheldon Court falls back upon California law -- which was (and which remains) hostile to McCarty -- for a contrary conclusion. The hostility of the state courts to the McCarty decision can be discerned in In Re Marriage of Jacanin, (1981) 124 Cal. App. 3d. 67. There, the Court of Appeal reluctantly reversed a trial court decision which divided a Navy pension as community property. The bulk

of the decision attacks the majority opinion in McCarty and commends the views of the minority. It is difficult to imagine a more reluctant acquiescence in a Supreme Court decision than the opinion in Jacanin.

As for the "substantial and equitable results" test, the Sheldon Court perceives inequity through reverse telescopic vision. It finds little inequity for the military member; it has but solicitude for the non-service member spouse. The Sheldon Court also exaggerates difficulties which might ensue through a retroactive application of McCarty. It is not necessary in this regard to rebut the Sheldon Court in each such particular. It is sufficient to point out that divorce courts uniformly retain jurisdiction over alimony awards and do not find it onerous to re-open alimony considerations upon motion of either party based upon changed circumstances. Divorce courts could here

do as much. Indeed, if the non-military spouse could make a showing of need (unlike the facts in the present dispute) modification of the award to allow the military member to retain the entirety of his retired pay should allow the ex-spouse to claim support based upon need. Divorce courts are skilled at making such determinations, and these determinations would pose no unusual difficulties.

Sheldon is not persuasive and should not be followed in this case. Ex Parte Buckhanan, supra, is persuasive: it follows the correct federal pre-emption analysis and should serve as a guide to a uniform rule concerning the availability of collateral attack on pre-McCarty decisions dividing military retired pay.

F. APPELLANT REFUSED TO ENTER A STIPULATION WHICH WAS PRESENTED WITHOUT HIS APPROVAL AND OVER HIS OBJECTIONS WHERE, AT MOST, IT IS AN

INADVERTANCE, AND, AT WORST, IT WAS A CLEAR CUT IMPROPER ACTION.

Appellant's Petition for rehearing and modification of the judgment was made to the Court below in light of factual errors in its opinion. These errors were brought about by Appellant's previous attorney of record withholding essential facts from the court which would have revealed that Appellant made no voluntary stipulation. Accordingly, it was appropriate that modifications should be made before the decision became final. New matter was submitted to the court and should have been considered as good cause and grounds for a rehearing. Traders and General Insurance Company v. Pacific Employers Insurance Company (1955) 130 Cal. App. 2d 158, 159; Sime v. Malouf (1949) 95 cal. App. 2d 88.

Appellant in his petition for hearing stated that no stipulation on military entitlements was entered into by him. The

entire testimony referencing the stipulation was fraudulently presented to the court by a previous attorney of record. Appellant's statement to the court in one motion was altered by the same attorney and duress was applied on Appellant. Every attempt by Appellant to claim military entitlements as separate property by Appellant was thwarted by his previous attorney of record, and timely attempts to appeal the improperly procured and entered stipulation were not honored by the same attorney.

Attorney of record acknowledged to the Court of Appeal in both Supplemental Points and Authorities submitted on April 19, 1982 and in oral argument that Appellant did not voluntarily stipulate to the paragraph 10 of the interlocutory decree. However, attorney's discussion is a faint effort and barely touches on the totality of the events which led to the stipulation fraudulently made by attorney.

Relief from a judgment under limited circumstances are applicable where a party seeks to vacate and set aside a stipulation which was not voluntarily given. Carter v Carter (1971, 19 C.A. 3d 479.

Appellant's previous attorney of record stated in the above mentioned Supplemental Points and Authorities:

> "The stipulation classifying future military benefits as community property was not voluntarily and freely given by appellant. No agreement, no offset, and no trade off of property rights was made. When respondent filed for divorce in California, appellant was told that "settled law" in California was that military retired pay was community property. However, Appellant remained adamant that he would take the case to the U.S. Supreme Court for resolution of that issue. The court, in effect, never received an agreement voluntarily or freely given. It was not until September 1979 when the Second District Court of Appeal rendered a decision in favor of separate property for Milhan did Appellant realize that his position could be supported. The motion in the trial court

> to set aside the characterization of community property was filed by Appellant on December 12, 1979 immediately after the Milhan District Court of Appeal decision and long before McCarty was known."

Relief from a stipulation may be granted in discretion of trial court in cases where facts stipulated have changed, there is fraud, mistake of fact, or other special circumstances rendering it unjust to enforce the stipulation. Sanserino v. Shamberger, (1966), 245 C.A. 2d 630.

In this case the stipulation was fraudulently made at trial by attorney of record and it would be unjust to enforce its terms against the Appellant. All subsequent actions by attorney concealed the true facts of Appellant's case wherein he never agreed to a division of his military entitlements.

Grounds upon which trial court may exercise its discretion to relieve party from binding effect of stipulation are that the stipulation was entered into as

the result of fraud, misrepresentation, mistake of fact, excusable neglect, or change of facts or some other special circumstances rendering it unjust to enforce the stipulation. People v. Trujillo, 136 Cal. Rptr. 672, 67 C.A. 3d 547.

Additionally, in this case the trial and appellate courts abused their discretion by not permitting an evidentiary hearing to establish the voluntariness of the stipulation.

If judgment is only partially void, and the void part is severable, that part alone may be collaterally attacked and the balance will remain effective, but if the judgment is not severable the whole may be attacked despite its partial validity. Perini v. Perini, (1964) 225 C.A. 2d 399.

In this case, the Trial Court divided all available property between Appellant and appellee equally, and separately dealt with the issue of the future Army retired

pay by retaining jurisdiction. To set aside that jurisdiction is now appropriate and does not affect the remainder of the dissolution decree.

CONCLUSION

A decision by this Court on the enumerated issues is required to assure consistent and fair interpretation of the relevant statutes and decisions.

For these reasons, the Court should note probable jurisdiction of this appeal.

Respectfully submitted,

SIDNEY H. YATEMAN
1031 PARKWAY DRIVE
PEBBLE BEACH, CA 93953

In Propria Persona

October 11, 1982

A copy of this Jurisdictional Statement shall be served upon the Attorney General of California, as 28 U.S.C. § 2403 (b) applies to this appeal.

DECLARATION OF MAILING

I, the undersigned, declare:

I am a citizen of the United States, employed in Monterey County, State of California, over the age of 18 years, and not a party to the above-entitled cause. My address is Box 2318, Carmel, CA 93921. I served the foregoing document by depositing a true copy thereof in the United States mails in Carmel, State of California, on October 12, 1982, enclosed in a sealed envelope with the postage thereon fully prepaid, addressed as follows:

Clerk of the First Appellate District
Division Three
350 McAllister Street
San Francisco, CA 94102

Attorney General (3)
State of California
6000 State Building
San Francisco, California 94102

Honorable Nat A. Agliano
Judge of the Superior Court
Monterey County Courthouse
Post Office Box 1819
Salinas, California 93902

William B. Daniels Esq.,
Attorney at Law
563 Figuero Street
Monterey, California 93940

Executed on October 12, 1982 at Carmel, California.

I declare under penalty of perjury that the foregoing is true and correct.

DEANNA PARAVICINI

APPENDIX A

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT,
DIVISION THREE

In re the marriage of Barbara Lee and Sidney Hersh Yateman	
BARBARA LEE YATEMAN, Plaintiff and Respondent, v. SIDNEY HERSH YATEMAN, Respondent and Appellant.	1 Civil 49751 (Super. Ct. No. MDR 10439)

Former husband, Sidney Hersh Yateman, appeals from the order denying his motions to set aside a portion of the interlocutory and final decrees of dissolution of marriage in which his military retirement benefits were determined to be community property to the extent they were attributable to

appellant's military service during marriage and to modify spousal support.

There have been extensive court proceedings in connection with the dissolution. We set forth the facts only insofar as they are pertinent to the issues on this appeal. The parties were married in 1959 and separated in 1978. Former wife, Barbara Lee Yateman, respondent herein, filed her petition for dissolution on March 13, 1978. In Sidney's response, he noted the "[p]otential partial community interest in [his] military retirement." On August 24, 1978, the parties stipulated in open court that the court would retain jurisdiction over Sidney's military retirement. The interlocutory judgment of dissolution of marriage was entered November 15, 1978 and provides, inter alia: "8. Respondent shall pay to petitioner spousal support in the sum of $550.00 per month, beginning September 1, 1978, and payable on the first day of each month thereafter for

the reasonable term of four (4) years, at which time the payment becomes $250.00 per month. Spousal support shall cease upon death of either party or remarriage of petitioner.

". . . . . .

"10. Respondent's military retirement is community property but at a presently undetermined amount. Petitioner shall be entitled to receive one-half of respondent's military retirement directly attributable to the years of marriage, June 14, 1959 until separation occuring [sic] sometime between February 25, 1978 and March 13, 1978. The question remains as to when respondent's military time commenced for retirement purposes, October 13, 1957 (entry date) or June 3, 1959 (graduation from West Point). The exact calculations are left to the parties subject to this court's continued jurisdiction to establish the exact figures should the parties be unable to do so at the time retirement commences."

On January 12, 1979, Sidney filed notice of appeal from the portions of the interlocutory judgment of dissolution of marriage which dealt with child support for daughter Jill, spousal support (see ¶ 8, supra), and the appraisal and division of property in his possession. No appeal was taken with respect to Sidney's military retirement. The appeal pertaining to the property was apparently not pursued. Final judgment of dissolution of marriage was entered June 13, 1979. On November 29, 1979, this court filed its opinion in 1 Civil 46564 holding that the trial court did not abuse its discretion in its award of child and spousal support.

On December 12, 1979, Sidney filed his notice of motion to modify spousal support, and a notice of motion "to set aside that portion of interlocutory and final decrees in which jurisdiction was retained over military retirement benefits by characterizing them as community property."

Hearing on the motions was held on January 31, 1980, and the matters submitted. On February 1, 1980, a minute order was filed which states:

"1. Respondent's motion to set aside that portion of the Judgment finding a community interest in Respondent's military retired pay and reserving jurisdiction to determine the amount payable upon vesting, is denied for two reasons:

"a) It is still the law in California that a community interest in military retired pay may be acquired during marriage.

"b) The evidence is insufficient to support a finding of entitlement to relief pursuant to Code of Civil Procedure Section 473.

"2. Respondent's motion to modify the order granting Petitioner spousal support of $550.00 per month is granted for the following reasons:

"There has been a change in

circumstances since the Order of August 23, 1978.

"Petitioner is employed earning $800.00 a month gross whereas she was not employed at the time of the Order. This income coupled with $300.00 a month interest income received since the Order of 1978, results in net monthly income after taxes of approximately $775.00.

"Since the original Order, Petitioner has assumed custody of the older daughter Jennifer who will attain majority in a month. Jennifer will not graduate from high school until June 1980. She is partly, but not totally, self-supporting. Petitioner will reasonably undertake to assist Jennifer financially at least thru June 1980.

"Respondent's income has increased $400.00 a month gross since 1978, and probably $200.00 net, after taxes.

"Petitioner's present income, including her net (after tax) spousal support, is judged sufficient to meet the expenses of

herself and the two children. It is noted that Petitioner's rent is $600.00 a month.

"The Court questions the reasonableness of Respondent's complaint of indigency, particularly with his substantial law school tuition expense.

"Nevertheless, it is concluded that some modification is reasonable.

"It is ordered that effective July 1, 1980 spousal support will be reduced to the sum of $400.00 per month. The Order of August 23, 1978 remains in effect in all other respects.

"Each party will bear his and her own attorney fees and costs."

On February 11, 1980, Sidney filed his "application to reconsider and modify prior order and request for further hearing thereon" pursuant to Code of Civil Procedure section 1008. On February 13, 1980, Sidney's motion for reconsideration was denied. On March 17, 1980 Sidney filed notice of appeal from the minute order filed

February 1, 1980.

Before this court, Sidney contends (1) that the trial court erred in subjecting his military retirement to the state community property scheme, and (2) that "the trial court abused its discretion in failing to terminate or further reduce spousal support below the sum of $400.00 per month."

We first address Sidney's military retirement. Initially he contends that Code of Civil Procedure section 473 is the appropriate vehicle "for a 'direct attack' on that portion of the judgment that deals with characterizing [his] military retirement benefits as community property and therefore subject to division."[1/] In the instant case, Sidney failed to appeal

1. Code of Civil Procedure section 473 provides in pertinent part: "The court may, upon such terms as may be just, relieve a party . . . from a judgment . . . taken against him . . . through his . . . mistake, inadvertence, surprise or excusable neglect. Application for such relief . . . must be made within a reasonable time, in no case exceeding six months, after such judgment, . . ."

from paragraph 10 of the interlocutory judgment of dissolution of marriage. The interlocutory judgment was entered November 15, 1978. As evidenced by Sidney's appeal from other portions of that judgment, it was appealable. (Code Civ. Proc., § 904.1, subd. (j).) Interlocutory decrees of dissolution are res judicata as to all questions determined therein, including the property rights of the parties. (Kulchar v. Kulchar (1969) 1 Cal.3d 467, 470; In re Marriage of Guardino (1979) 95 Cal. App.3d 77, 87, hg. den.) "The mere fact that the final decree restated and reaffirmed the previous judgment made and entered at the time of the trial and included in the interlocutory judgment conferred no right of appeal as to matters involved and finally determined by the original interlocutory judgment" (Huneke v. Huneke (1909) 12 Cal.App. 199, 204), for "[t]he law of this state does not allow, on an appeal from a judgment, a review of any decision or order

from which an appeal might . . . have been taken" (Woodman v. Ackerman (1967) 249 Cal.App.2d 644, 648).[2] Since Sidney failed to raise the status of his military retirement in his original appeal from the interlocutory judgment of dissolution of marriage, he waived any subsequent right to appeal the issue. We note also that the interlocutory judgment of dissolution was entered November 15, 1978. His motion was filed December 12, 1979. Under section 473, it was not timely filed.

Finally, in denying Sidney's motion, the trial court correctly recognized that at the time the matter was heard, and at the time the parties stipulated, California law

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2. Appellant calls the court's attention to the printed provision of the final judgment form which provides: "Pursuant to Civil Code Section 4506(1). . .a Final Judgment of Dissolution be entered, and that all of the provisions of the interlocutory judgment, which was entered on Nov. 15, 1978, except as otherwise set out below, be made binding the same as if set forth in full, and that the parties be restored to the status of unmarried persons." This does not assist him.

was well settled that Sidney's military retirement was subject to division as community property. McCarty vs. McCarty (1981) _____ U.S. _____, [69 L.Ed.2d 589; 101 S.Ct. 2728] may not be given retroactive application in cases where the issue of the community nature of a military retirement pension was adjudicated, and the issue was not timely raised on appeal. (In re Marriage of Fellers (1981) 125 Cal.App.3d 254; In re Marriage of Mahone (1981) 123 Cal.App.3d 17, hg. den.)

We turn then to Sidney's contention that the trial court abused its discretion in failing to terminate or further reduce spousal support below the sum of $400 per month. It is quite clear from the trial court's order and the resulting reduction in spousal support that it fully recognized the change in circumstances which had occurred since August 23, 1978. "It is axiomatic that the trial court has broad discretion with respect to modification of support

orders, and that appellate review of such modifications is limited accordingly. (In re Marriage of Judd (1977) 68 Cal.App.3d 515, 524 . . . .)" (Verner v. Verner (1978) 77 Cal.App.3d 718, 726-727.) Sidney has failed to demonstrate an abuse of discretion.

The order is affirmed.

White, P. J.

We concur:

Feinberg, J.

Barry-Deal, J.

1 Civil 49751

APPENDIX B

Document 1: Interlocutory Judgment (entered November 15, 1978)

SUPERIOR COURT OF CALIFORNIA

COUNTY OF MONTEREY

In re the marriage of	Case No.
Petitioner: BARBARA LEE YATEMAN	MDR 10439
and	INTERLOCUTORY JUDGEMENT OF
Respondent: SIDNEY HERSH YATEMAN	DISSOLUTION OF MARRIAGE

This proceeding was heard on August 24, 1978 before the Honorable E. J. Leach.

The court acquired jurisdiction of the respondent on March 13, 1978 by:

( ) Service of process on that date, respondent not having appeared within the time permitted by law.

(X) Service of process on that date and respondent having appeared.

( ) Respondent on that date having appeared.

The court orders that an interlocutory judgment be entered declaring that the parties are entitled to have their marriage dissolved. This interlocutory judgment does not constitute a final dissolution of marriage and the parties are still married and will be, and neither party may remarry, until a final judgment of dissolution is entered.

The court also orders that, unless both parties file their consent to dismissal of this proceeding, a final judgment of dissolution be entered upon proper application of either party or on the court's own motion after the expiration of at least six months from the date the court acquired jurisdiction of the respondent. The final judgment shall include such other and further relief as may be necessary to complete disposition of this proceeding, but entry of the final judgment shall not deprive this court of its jurisdiction over any matter expressly reserved to it in this

or the final judgment until a final disposition is made of each such matter.

The Court further orders both parties to carry out the following terms and provisions of this Interlocutory Judgment:

1. Physical custody of daughter JENNIFER YATEMAN, born March 5, 1962, is awarded respondent with reasonable rights of visitation to petitioner.

2. Physical custody of daughter JILL YATEMAN, born March 8, 1964, is awarded petitioner with reasonable rights of visitation to respondent.

3. Respondent receives the Mercury station wagon as sole property while petitioner receives the Volkswagon sedan and both parties agree the value is approximately equal.

4. The real property located in Wilton, Connecticut, shall be placed on the market and sold with the proceeds divided equally between respondent and petitioner. Respondent shall continue to make al[illegible]tax

payments thereon and shall receive credit on such payments at time of sale.

5. Respondent shall maintain a minimum of $10,000.00 life insurance with each daughter as beneficiary until each daughter reaches the age of majority.

6. Each party will pay their own attorney's fees.

7. Respondent shall pay to petitioner child support in the sume of $200.00 per month, beginning September 1, 1978 and payable on the first day of each month until daughter JILL reaches the age of eighteen (18) or is sooner emancipated or deceased.

8. Respondent shall pay to petitioner spousal support in the sum of $550.00 per month, beginning September 1, 1978, and payable on the first day of each month thereafter for the reasonable term of four (4) years, at which time the payment becomes $250.00 per month. Spousal support shall cease upon the death of either party or remarriage of petitioner.

9. The community property home located at 1031 Parkway Drive, Pebble Beach, California, is valued at fair market value of $140,000.00 against which exists encumbrances of $53,002.46. The equity is, therefore, $86,997.54. Respondent shall retain the home as his sole and separate property and pay petitioner one-half (1/2) the equity, i.e. the sum of $43,498.77.

10. Respondent's military retirement is community property but at a presently undetermined amount. Petitioner shall be entitled to receive one-half of respondent's military retirement directly attributable to the years of marriage, June 14, 1959 until separation occuring sometime between February 25, 1978 and March 13, 1978. The question remains as to when respondent's military time commenced for retirement purposes, October 13, 1957 (entry date) or June 3, 1959 (graduation from West Point). The exact calculations are left to the parties subject to this court's continued

jurisdiction to establish the exact figures should the parties be unable to do so at the time retirement commences.

11. Household goods, furnishings, jewelry and all community property, personal property remaining in possession of respondent shall be appraised and divided equally. The court shall retain jurisdiction over this matter.

12. Respondent shall continue to reside in a $140,000.00 home and send daughter JENNIFER to the private school, Robert Louis Stevenson.

13. The outstanding cash value of insurance policies shall be determined as soon as possible and respondent shall pay one-half (1/2) of said cash value to petitioner.

14. Both parties are restrained from being in and about the residence of the other except upon reasonable notice for visitation purposes and with permission. Telephone communications with the respective daughters is limited to the hours of 8:00 a.m. and

8:00 p.m.

Any issue left unresolved in this Order shall remain within the jurisdiction of the court.

E. J. Leach
JUDGE OF THE SUPERIOR COURT

Dated: 11/15/78

Document 2: Final Judgment
(entered June 13, 1979)

SUPERIOR COURT OF CALIFORNIA

COUNTY OF MONTEREY

In re the marriage of	Case No.
Petitioner: BARBARA LEE YATEMAN	MDR 10439
and	FINAL JUDGMENT
Respondent: SIDNEY HERSH YATEMAN	(MARRIAGE) OF DISSOLUTION

The court acquired jurisdiction of the respondent on March 13, 1978 by:

( ) Service of process on that date, respondent not having appeared within the time permitted by law.

(X) Service of process on that date and respondent having appeared.

( ) Respondent on that date having appeared.

The court orders that:

( ) Pursuant to ( ) Civil Code Section 4506(1) or ( ) Civil Code Section 4506(2), a Judgment of Legal Separation and such other orders as are set out below be entered.

( ) Pursuant to ( ) Civil Code Section 4400, ( ) Civil Code Section 4401, or ( ) Civil Code Section 4425( ), a Judgment of Nullity and such other orders as are set out below be entered, and that the parties be restored to the status of unmarried persons.

(X) Pursuant to ( ) Civil Code Section 4506(1) or ( ) Civil Code Section 4506(2), a Final Judgment of Dissolution be entered, and that all of the provisions of the interlocutory judgment, which was entered on Nov. 15, 1978, except as otherwise set out below, be made binding the same as if set forth in full, and that the parties be restored to the status of unmarried persons.

Dated: June 12, 1979

RALPH M. DRUMMOND
JUDGE OF THE SUPERIOR COURT

APPENDIX C

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT,
DIVISION THREE

In re the marriage Barbara Lee and Sidney Hersh Yateman	
BARBARA LEE YATEMAN, Respondent, vs. SIDNEY HERSH YATEMAN, Appellant.	1 Civil 46564 (Sup. Ct. No. MDR 10439)

The husband appeals from that portion of an interlocutory judgment of dissolution of marriage which awarded spousal support to the wife of $550.00 per month and child support of $200.00 per month. We have concluded that, on the record before us, the

trial court did not abuse its discretion, or fail to find on material issues of fact.[1]

(1) Did the Trial Court Abuse Its Discretion by Awarding $550.00 Per Month Spousal Support and $200.00 Per Month Child Support?

In setting the amount of support, a wide discretion is vested in the trial court. A finding of abuse of that discretion will be made only when, "after calm and careful review of the entire record, it can fairly be said that no judge would reasonably make the same order under the same circumstances." (In re Marriage of Roesch (1978) 83 Cal. App.3d 96, 102; In re Marriage of Lopez (1974) 38 Cal.App.3d 93, 114.)

The husband contends that the court

1. On appeal, the husband has alleged that the wife's circumstances have significantly changed since the entry of the support order as part of the interlocutory judgment of dissolution. None of those changes are contained in the record of appeal, however. More fundamentally, events occurring after the entry of the support order are not grounds for reversal of the order on appeal. If one party's circumstances have changed, the other has a remedy in the trial court.

that the court abused its discretion by failing to consider the following factors in determining the proper amount of spousal support: (1) the wife's ability to find present employment; (2) the husband's needs and living expenses; (3) the nature and extent of the community property awarded to the wife; (4) the wife's needs and living expenses; and (5) "Other factors," by which the husband means primarily the relationship of the wife to the man with whom she and her daughters lived during the period of the separation.

It appears from the record that the trial court did consider these factors. In this case, as the trial court observed, it was evident that adjustments would have to be made by both parties if they were to manage living apart. It is true that, according to the parties' financial declarations, the husband would not be able to meet the spousal and child support orders with his current income and expenses.

However, neither was the wife able to live without spousal and child support, at least as of the time of the trial. The disagreement over the proper amount of support stems from the fact that there simply was not enough money to support two separate households without a substantial revision of both parties' standard of living.

Wife's ability to work. The wife had not worked during the course of this 19-year marriage, except during the two years prior to separation, when she was employed first as a secretary and then in a bakery. She indicated at trial that she would soon be attending college to obtain a degree and was fairly certain of obtaining part-time employment under a work-study program. The husband argues that she is presently able to secure other employment in addition to college and her work-study program, and/or that she should have accepted a job as a salesperson or in another capacity which

would be more remunerative immediately. As the trial court observed, the long-range prospects for the wife would be far better if she followed her current plans. The record does not support appellant's contention that the wife is able but simply unwilling to accept other employment right now.

Husband's needs and living expenses. It is true that the spousal support order is not within the husband's present ability to pay according to his financial declaration. However, the wife testified that she had no other source of income at the time of the trial, and that testimony was not disproved. Although she received $43,000 from the husband as payment for her interest in the community residence, the interest from investing that money would be only about $250.00 per month. There is no other evidence before this court as to the wife's present earnings or other sources of support. Clearly, then, the support order

was necessary to enable the wife to meet her monthly expenses.

Nature of community property awarded to wife. The major community asset was the family residence. The residence was awarded to the husband with an equalizing payment to the wife for her interest in the property. The parties effected an equal division of property; the wife did not receive a disproportionate share and the cash payment from the husband was not a disguised support payment which should offset his support obligation. The judge apparently did take into account the monthly interest which the wife will earn from investment of the money.

The wife's needs and living expenses were obviously taken into account. There was no showing that her expenses were excessive.

Other sources of support. The husband contended at trial that the wife was supported by the man with whom she was living during the period of the separation.

However, the wife contradicted this testimony. While the wife admitted that she had accepted gifts from the man, she denied that she had free access to his bank accounts, that she knew that she was going to inherit his estate, or that she would continue living in his house rent-free. As of the time of the trial, she had rented a house for herself and her daughter in Carmel; any money she borrowed from him was done with a written promise to repay. The husband did not produce evidence other than his own testimony regarding the amount of such support given to the wife. Further, such support, if any, was purely volitional upon the part of the donor and thus the trial court could properly disregard it in fixing the amount specified in the original support order.

(2) Did the Court Fail To Find on Material Issues of Fact?

The husband also attacks the judgment in the trial court on the grounds that the

trial court failed to find on the facts pertaining to the wife's earning capacity, and on the amount of money she could derive from investment of the $43,000 received by her from the husband for her interest in the community residence.

The judge signed the Proposed Findings of Fact prepared by the wife. The first finding stated: "1. Respondent's [husband's] gross monthly income is at least $2,502.43. Withheld income tax and social security will be approximately $592.74. Petitioner [wife] presently has a promise of employment and will soon be able to assist in her own support. In the interim other work is available to her, and she has some income which can be derived from funds in her possession." This finding seems to take into account the income which could be derived from investment of the $43,000, since there was no indication that she had any other funds. Thus, appellant's request for a special finding on that issue was in

essence repetitious of a finding the court had already made. The spousal support and child support order gave the wife $750.00 per month to meet expenses of approximately $1,000. Obviously the judge was taking into account the proceeds of the $43,000 investment.

The husband requested special findings with regard to how much the wife could earn were she presently employed, how much she had earned previously, and a finding that she "is presently employable and has not sought nor been interested in employment."

The husband's objections are unfounded. The wife made a choice between finding immediate, low-paying employment and returning to school to obtain a degree which would enable her to become entirely self-supporting. She intended, furthermore, to engage in a work-study program which would give her an unascertained amount of monthly income and at the same time provide her with training in her field of study. Any

findings with regard to her past earnings would have been irrelevant; and any made as to her future earning capacity, entirely speculative. A finding that she had not sought and was uninterested in finding employment would have been directly contradictory to the wife's testimony on this subject which was itself uncontradicted.

The judgment is affirmed.

Feinberg, J.

I concur:

White, P.J.

I concur in the judgment.

Scott, J.

APPENDIX D

[The order of the California Supreme Court denying Appellant's petition for a hearing appears in the court's minutes for July 22, 1982. Those minutes are reprinted in the advance sheets of "California Official Reports", 1982, number 22, Minutes, at P.5 (August 17, 1982). The minutes will not appear in the bound version, known as "California Reports" 3d.]

MINUTES

SUPREME COURT [OF CALIFORNIA]

San Francisco, July 22, 1982

. . . . .

(1 Civ. 49751 Div. 4)--In re the Marriage of YATEMAN, YATEMAN v. YATEMAN. Appellant's petition for hearing denied.

APPENDIX E

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Attorney at Law
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In Propria Persona

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

In re the marriage of BARBARA LEE YATEMAN, Petitioner & Appellee, vs. SIDNEY HERSH YATEMAN, Respondent & Appellant.	1/CIV. 49751

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Sidney Hersh Yateman, the Respondent and Appellant named above, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeal of the State of California, First Appellate District, Division Three, entered in this action on

May 12, 1982, which affirmed the Superior Court's judgment dissolving the parties' marriage.

This appeal is taken pursuant to 28 U.S.C. §1257 (2).

SIDNEY H. YATEMAN
In Propria Persona

APPENDIX F

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Article VI, clause 2:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding.

California Civil Code §4800(a):

> Except upon the written agreement of the parties, or on oral stipulation of the parties in open court, the court shall, either in its interlocutory judgment of dissolution of the marriage, in its judgment decreeing the legal separation of the parties, or at a later time if it expressly reserves jurisdiction to make such a property division, divide the community property and the quasi-community property of the parties, including any such property from which a homestead has been selected, equally. For purposes of making such division, the court shall value the assets and liabilities as near as practicable to the time of trial, except that, upon 30 days' notice by the moving party to the other party, the court for good cause shown may value all or any portion of the assets and liabilities at a date after separation and prior to trial to accomplish an equal division of the community property and the quasi-

community property of the parties in an equitable manner.

Title X, Uniformed Services Former Spouses' Protection Act (H5957 & S1814).

§1408(c)(1) "Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

Supreme Court, U.S.
FILED
JAN 3 1983
ALEXANDER L. STEVAS
CLERK

No. 82-646

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

SIDNEY HERSH YATEMAN, APPELLANT

v.

BARBARA LEE YATEMAN, APPELLEE

ON APPEAL FROM THE COURT OF APPEAL

OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION THREE

SUPPLEMENTAL BRIEF TO JURISDICTIONAL STATEMENT

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IN PROPRIA PERSONA

DECEMBER 29, 1982

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 82-646

SIDNEY HERSH YATEMAN, APPELLANT

v.

BARBARA LEE YATEMAN, APPELLEE

ON APPEAL FROM
THE COURT OF APPEAL OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION THREE

SUPPLEMENTAL BRIEF TO JURISDICTIONAL STATEMENT

Appellant Sidney Hersh Yateman submits this supplemental brief calling attention to further unresolved federal questions resulting from the new legislation of Title X, Uniformed Services Former Spouses' Protection Act published and distributed since Appellant's last filing.

ADDITIONAL QUESTIONS PRESENTED

I. Whether retired military compensation is "deferred compensation for services already completed or reduced compensation for current services.

II. Whether Title X, Uniformed Services Former Spouses' Protection Act is constitutional with respect to its retroactive application to June 25, 1981.

TABLE OF CONTENTS

Questions Presented..... ii

Table of Contents..... iii

Table of Authorities..... iv

Additional Questions which are Substantial

THE NATURE OF MILITARY COMPENSATION AS EITHER "DEFERRED" COMPENSATION FOR SERVICES ALREADY COMPLETED OR, REDUCED COMPENSATION FOR THE SPECIAL OBLIGATIONS IMPOSED ON RETIREES, IS A MOST SUBSTANTIAL FEDERAL QUESTION AFFECTING THE CONSTITUTIONALITY OF TAKING PART OR ALL OF ONE'S PROPERTY WITHOUT DUE PROCESS OF LAW..... 1

THE RETROACTIVE APPLICATION OF TITLE X, UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT TO JUNE 25, 1981 IS UNCONSTITUTIONAL SINCE IT CONSTITUTES A TAKING OF ONE'S PROPERTY WITHOUT DUE PROCESS OF LAW..... 6

THE RESERVATION OF JURISDICTION BY THE STATE COURT IS SUFFICIENT TO PRESERVE THE FEDERAL PRE-EMPTION ISSUE; A SUBSTANTIAL FEDERAL QUESTION..... 7

CONCLUSION..... 9

Proof of Service by Mail..... 11

Appendix

A. Statute Involved..... 12

TABLE OF AUTHORITIES

CASES CITED:

(Bennett v. Bennett)
131 Cal. App. 3d 299 (1982)- - - - - - - -7,9

In Re Marriage of Milhan II
97 Cal. App. 3d 41 (1979) - - - - - - - - 7

In Re Marriage of Jacanin
124 Cal. App. 3d 67 (1981)- - - - - - - - 9

In Re Marriage of Mahone
123 Cal. App. 3d 17 (1981)- - - - - - - - 9

In Re Marriage of Sheldon
124 Cal. App. 3d 371 (1981)- - - - - 8,9

McCarty v McCarty
453 U.S. _____,101 S. Ct, 2728 (1981) 1,6,7,9

Wintress v. Superior Court
131 C.A. 3d 906 (1982)- - - - - - - - - - 7,9

STATUTES CITED

Title X, Uniformed Services Former Spouses' Protection Act P.L. 97-252
(September 8, 1982)- - - - - - - - - - - -1,6

I

THE NATURE OF MILITARY COMPENSATION AS EITHER "DEFERRED" COMPENSATION FOR SERVICES ALREADY COMPLETED OR, REDUCED COMPENSATION FOR THE SPECIAL OBLIGATIONS IMPOSED ON RETIREES, IS A MOST SUBSTANTIAL FEDERAL QUESTION AFFECTING THE CONSTITUTIONALITY OF TAKING PART OR ALL OF ONE'S PROPERTY WITHOUT DUE PROCESS OF LAW.

When the Congress passed the Uniformed Services Former Spouses Protection Act, the new law affected the decision McCarty v McCarty 453 U.S. ____, 101 S. Ct. 2728 (1981) wherein the court had reaffirmed the long-established doctrine that retired pay is an individual entitlement, with payments at a reduced rate for reduced but continuing service.

If the new law regards part of the retired pay as the property of the ex-spouse, surely the rest of it must be the property of the retiree. And, if it is property after the divorce, it must have been property before the divorce. Further, if it is property, it appears it must be unconstitutional to take part or all of it away without due process of law. This would be proper

only if it is accepted that the military retired pay is vested property in the same sense that a Civilian annuity is vested. But Congress has not been treating retired pay as though it were vested property. Time after time, it has changed the laws governing amounts and conditions of entitlement without regard to principles of due process.

There was a law on the books in 1958 that required recomputation of retired pay on the basis of new, higher basic pay rates. But Congress superceded that law with another providing a smaller raise for retirees. In 1963, retired pay raises were tied to inflation. For some years, a one percent "kicker" was added to each cost-of-living adjustment. Recently, the frequency of adjustments has been cut, the amounts cut for those under age 62 and the increases delayed an additional month in each of the next three years. New "double-dipper" restrictions impose a salary penalty for military retirees who work as federal civilians.

If retired pay is property, these actions appear to violate contractual equity and due process. There is no emergency, the retirees acquired their entitlements legally, they owe no debt to the government; hence no valid tax can be levied retroactively on their property.

It is essential that this Court settle a fundamental question: Just what is military "retired pay?" Is it deferred compensation for past services? Or is it current pay for reduced current service? Was it earned year by year on active duty? Or is it a current incentive for reduced service, one that can be reduced at any time?

If it should be established clearly as property, retired pay earned in the past might have to be recomputed, year by year, to assess its value in terms of the laws in effect at the time it was earned. Thus, if people retired under a law establishing their retired pay as a fixed ratio to basic pay (50 percent for 20 years, and so on), that

entitlement might be vested and permanent.

Likewise, the laws in effect during each year of service might have to be given full weight in such calculations. For example, the reduction of retired pay for those under age 62 was not on the books when most of the people now in the service first entered. Can the value of the service they performed in past years be reduced by a subsequent act of Congress?

If Cost-of-Living adjustments were made twice a year when a person first retired, does that become an implied contractual obligation on the part of the government to continue such a schedule? Perhaps it means that if a person was on active duty for two years while that schedule was in effect, then the two years' value on subsequent retirement would have to be adjusted twice a year. In other words, five percent of the person's annuity in this example would be adjusted for inflation twice a year.

Historically, the government's legis-

lative and judicial branches all have treated retired pay as pay for current service. There were a few disparities. Retired pay could not be counted as currently earned income for purposes of establishing Individual Retirement Accounts or for the "earned income exclusion" break in the federal income tax provisions. Nor was it counted as income subject to the Social Security tax.

If it is pay for current service, then there is ground for claiming that the government can enforce restrictions on "second-career" employment, enforce dual compensation reductions in federal civilian pay, order people back to active duty involuntarily - interrupting their private business and personal pursuits - and demand adherence to the requirements of the Uniform Code of Military Justice on penalty of court-martial, with possible punishments ranging from fines all the way to discharge from military status and permanent forfeiture of

retired pay.

If, instead, it is deferred compensation - vested property, in other words - then a lot of new calculations will have to be made as to how much is owed to those now retired and to those still on active duty whose past service was performed under a variety of different laws.

II

THE RETROACTIVE APPLICATION OF TITLE X, UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT TO JUNE 25, 1981 IS UNCONSTITUTIONAL SINCE IT CONSTITUTES A TAKING OF ONE'S PROPERTY WITHOUT DUE PROCESS OF LAW.

When Congress passed the Uniformed Services Former Spouses' Protection Act it provided an effective date of February 1, 1983. However, the Congress attempted to overrule this Court's decision in McCarty v McCarty by the wording of legislation. Although the legislation was not passed until September 1982, the specific wording includes the following:

> "Subject to the limitations of this section, a Court may treat disposable retired or retainer pay payable to a member for pay periods beginning

after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court."

This learned Court should note that numerous cases are affected by the retroactive application of the Uniformed Services Former Spouses Protection Act to McCarty v McCarty. This appeal, for example, would have been a companion case to McCarty and Milhan but for the improper actions of appellant's attorney discussed in the Jurisdictional Statement and Motion to Oppose Appellee's Motion to Dismiss or Affirm.

III

THE RESERVATION OF JURISDICTION BY THE STATE COURT IS SUFFICIENT TO PRESERVE THE FEDERAL PRE-EMPTION ISSUE; A SUBSTANTIAL FEDERAL QUESTION.

Since Appellant's Appellate decision was rendered the decisions of Wintriss v. Superior Court, 131 C.A. 3d 906 (1982) and Bennett v. Bennett 131 C.A. 3d 299 (1982), have come down as published decisions in California and they are clear that a reservation of jurisdiction is proper to keep

before the trial court the question of who is entitled to ongoing payments of military retired pay. The reservation of jurisdiction contained in Appellant's Interlocutory Decree, drafted in 1978, is extremely broad:

> "Respondent's military retirement is community property but at a presently undetermined amount. Petitioner shall be entitled to receive one-half of respondent's military retirement directly attributable to the years of marriage, June 14, 1959 until separation occuring sometime between February 25, 1978 and March 13, 1978. The question remains as to when respondent's military time commenced for retirement purposes, October 13, 1957 (entry date) or June 3, 1959 (graduation from West Point). The exact calculations are left to the parties subject to this court's continued jurisdiction to establish the exact figures should the parties be unable to do so at the time retirement commences."

Appellee has never argued that the reservation of jurisdiction was insufficient to preserve the Federal pre-emption issue. Indeed, her counsel drafted it, and any doubt of its meaning would be interpreted against her.

This case fits the ruling of In Re Marriage of Sheldon (1981) 124 C.A. 3d 371,

which held in pertinent part that McCarty would apply to closed cases if there had either been a reservation of jurisdiction over the military retired pay issue or a request to the trial court to retain jurisdiction that had been denied and timely taken up on appeal. It is not a Mahone situation (In Re Marriage of Mahone (1981) 23 C.A.3d 17) as indicated by appellee wherein there was a substantive stipulation that military retired pay would be divided but no reservation of jurisdiction over the character of the ongoing payments or any request, timely appealed from, that the court so reserve jurisdiction. McCarty, supra; In Re Marriage of Jacanin (1981) 124 C.A. 3d 67; Sheldon, supra; Wintriss, supra; and Bennett, supra, are dispositive.

CONCLUSION

Recent Congressional legislation has generated additional federal questions for this Court to consider in addition to those already presented in the Jurisdictional

Statement. For this reason, the Court should note probable jurisdiction of this appeal.

Respectfully submitted,

SIDNEY H. YATEMAN
1031 PARKWAY DRIVE
PEBBLE BEACH, CA 93953

December 29, 1982 _____ In Propria Persona

A copy of this Jurisdictional Statement shall be served upon the Attorney General of California, as 28 U.S.C. § 2403 (b) applies to this appeal.

DECLARATION OF MAILING

I, the undersigned, declare:

I am a citizen of the United States, employed in Monterey County, State of California, over the age of 18 years, and not a party to the above-entitled cause. My address is Fremont Professional Center, Seaside, CA 93955. I served the foregoing document by depositing a true copy thereof in the United States mails in Seaside, State of California, on December 30, 1982, enclosed in a sealed envelope with the postage thereon fully prepaid, addressed as follows:

Clerk of the First Appellate District
Division Three
350 McAllister Street
San Francisco, CA 94102

Attorney General (3)
State of California
6000 State Building
San Francisco, CA 94102

Honorable Nat A. Agliano
Judge of the Superior Court
Monterey County Courthouse
Post Office Box 1819
Salinas, CA 93902

William B. Daniels Esq., (3)
Attorney at Law
563 Figueroa Street
Monterey, CA 93940

Executed on December 30, 1982 at Seaside, California.

I declare under penalty of perjury that the foregoing is true and correct.

Saul M. Weingarten

APPENDIX A

STATUTES INVOLVED

Title X - Former Spouses' Protection (Public Law - 97-252)

Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

The amendments made by this title shall take effect on the first day of the first month which begins more than one hundred and twenty days after the date of the enactment of this title.

Subsection (d) of section 1408 of title 10, United States Code, as added by section 1002(a), shall apply only with respect to payments of retired or retainer pay for periods beginning on or after the affective date of this title, but without regard to the date of any court order. However, in the case of a court order that became final before June 26, 1981, payments under such subsection may only be made in accordance with such order as in effect on such date and without regard to any subsequent modifications.

Office - Supreme Court, U.S.
FILED
DEC 27 1982
ALEXANDER L. STEVAS,
CLERK

NO. 82-646

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

SIDNEY HERSH YATEMAN, APPELLANT

v.

BARBARA LEE YATEMAN, APPELLEE

ON APPEAL FROM THE COURT OF APPEAL

OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

MOTION OF APPELLEE,

BARBARA LEE YATEMAN,

TO DISMISS OR AFFIRM

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DECEMBER 23, 1982

NO. 82-646

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

SIDNEY HERSH YATEMAN, APPELLANT

v.

BARBARA LEE YATEMAN, APPELLEE

ON APPEAL FROM THE COURT OF APPEAL

OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

MOTION OF APPELLEE,

BARBARA LEE YATEMAN,

TO DISMISS OR AFFIRM

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DECEMBER 23, 1982

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 82-646

SIDNEY HERSH YATEMAN, APPELLANT

v.

BARBARA LEE YATEMAN, APPELLEE

ON APPEAL FROM
THE COURT OF APPEAL OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION THREE

MOTION OF APPELLEE, BARBARA LEE YATEMAN, TO DISMISS OR AFFIRM

The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Court of Appeal of California on the grounds that: (1) the federal question sought to be reviewed was not timely or properly raised and was not expressly passed on by the Court; and (2) that the judgment rests on an adequate nonfederal basis.

BASES FOR THE MOTION

I. THE PORTION OF THE TRIAL COURT JUDGMENT IN ISSUE WAS STIPULATED TO BY THE APPELLANT; HE FAILED TO TIMELY APPEAL THAT PORTION AND HE FURTHER FAILED TO MOVE TO SET IT ASIDE ON APPROPRIATE GROUNDS AND WITHIN THE TIME REQUIRED BY STATE LAW.

II. THE FEDERAL QUESTION SOUGHT TO BE REVIEWED WAS NOT TIMELY OR PROPERLY RAISED.

III. THE JUDGMENT RESTS ON ADEQUATE NONFEDERAL BASIS.

IV. CONCLUSION

TABLE OF CONTENTS

Bases for the Motion ii

Table of Contents. iii

Table of Authorities iv

THE PORTION OF THE TRIAL COURT JUDGMENT IN ISSUE WAS STIPULATED TO BY THE APPELLANT; HE FAILED TO TIMELY APPEAL THAT PORTION AND HE FURTHER FAILED TO MOVE TO SET IT ASIDE ON APPROPRIATE GROUNDS AND WITHIN THE TIME REQUIRED BY STATE LAW. 1

THE FEDERAL QUESTION SOUGHT TO BE REVIEWED WAS NOT TIMELY OR PROPERLY RAISED. 5

THE JUDGMENT RESTS ON ADEQUATE NONFEDERAL BASIS 7

CONCLUSION 11

Proof of Service by Mail 13

Appendices:

A. Transcript of Proceedings. . . 14
B. Declaration of Respondent, Sidney Hersh Yateman 25
C. Complaint for Damages for Malpractice. 30
D. Statutes Involved. 50

TABLE OF AUTHORITIES

CASES CITED:

Beaty v. Richardson (1927), 276 U.S. 599, 48 S.Ct. 320, 72 L.Ed. 24 — 7

Eerie Railway Company v. Purdy (1901), 185 U.S. 148, 22 S.Ct. 605, 46 L.Ed. 847 — 6

Ferguson v. Georgia (1961) 365 U.S. 570, 572, 81 S.Ct. 756, 5 L.Ed. 2d 783 — 6

Fox Film Corporation v. Muller (1935), 296 U.S. 207, 56 S.Ct. 183, 80 L.Ed. 158 — 11

Herndon v. Georgia (1934), 295 U.S. 441, 443, 55 S.Ct. 794, 79 L.Ed. 1530 — 7

In Re Lampkin (1957), 355 U.S. 59, 78 S.Ct. 137, 2 L.Ed.2d 107 — 6

In Re Marriage of Mahone (1981), 123 Cal.App.3d 17, 176 C.R. 274 — 10

Jackson v. Puget Sound Lumber Co. (1898), 123 Cal. 97, 155 P.2d 788 — 8

Murdock v. Memphis (1874) Wall 590, 636, 22 L.Ed.429 — 11

Palmer v. Long Beach (1948) 33 Cal.2d 134, 142, 199 P.2d 952 — 7

Pennsylvania Railroad Company v. Illinois Brick Company (1935), 297 U.S. 447, 462-463, 56 S.Ct. 556, 80 L.Ed. 796 — 6

Swenson v. File (1973), 3 Cal.3d 389, 393, 90 C.R. 580, 475 P.2d 852 — 10

STATUTES CITED:

California Civil Code §4800 — 5, 8

California Code of Civil Procedure §473 — 2, 4, 5

I.

THE PORTION OF THE TRIAL COURT JUDGMENT IN ISSUE WAS STIPULATED TO BY THE APPELLANT; HE FAILED TO TIMELY APPEAL THAT PORTION AND HE FURTHER FAILED TO MOVE TO SET IT ASIDE ON APPROPRIATE GROUNDS AND WITHIN THE TIME REQUIRED BY STATE LAW.

The trial leading to the Interlocutory Judgment before the Honorable E. J. Leach, Jr., began on August 24, 1978, with an assertion by the Appellant's counsel that certain matters were stipulated to concerning the issues in the case. Among them was "the military retirement of the respondent, Sidney Yateman."

After the Appellant confirmed the date of his graduation from West Point, Appellee's trial counsel, Mr. Piggott, stated:

> Mr. Piggott: 3 June 1959 is the date that should be used to calculate retirement and community property.

> Mr. Bebermeyer: Our position is slightly to the contrary. We take into account that two years for pay purposes which will have total 22 years and take the percentage thereof and we come out with 42.163% being Mrs. Yateman's interest in the retirement when he does retire.
>
> Mr. Piggott: With ours it becomes 46.875%. We would ask the court to retain jurisdiction. I believe we will be able to work out when we find out exactly how the Army calculates it.

The Interlocutory Judgment was filed on November 15, 1978.

The Appellant's first appeal from that judgment followed, but no objection concerning his military pension was included among the issues. The Appellate Court rendered and filed its decision on November 29, 1979.

Thereafter, Appellant filed a motion to set aside the Interlocutory Judgment pursuant to California Code of Civil Procedure, §473. His claim of "mistake,

inadvertence, surprise or excusable neglect" was based on his declaration under penalty of perjury in which he said:

> I was adamant that all military retirement benefits were my separate property and agreed to the stipulation only because at the time the California Supreme Court had held in In Re Marriage of Fithian that such benefits were divisible because such division did not interfere in any way with the administration or goals of the federal military retirement pay system. Recent developments in the law and research has proven otherwise. I further detrimentally relied on the improper holdings of the California Courts that retirement benefits which had not yet vested at time of dissolution of marriage were also divisible, as expressed in In Re Marriage of Brown. Again, recent developments in the law and extensive research has indicated that such a holding is improper and that the California law dealing with military retirement benefits is void on its face because it interferes with the objectives or requirements of the federal retirement pay system. At the time of

> trial, no case of similar nature had been heard by the U.S. Supreme Court overruling the California decisions regarding the community property interpretation for retirement benefits. However, the California Supreme Court has been overruled subsequently in Hisquerdo v. Hisquerdo, 99 S.Ct. 802, decided January 22, 1979.

In response to Appellant's motion, the court found that the evidence is "insufficient to support the finding of entitlement to relief pursuant to Code of Civil Procedure, Section 473." That sentiment was confirmed upon Appellant's second appeal to the First Appellate District when the Court affirmed the trial court saying:

> Since Sidney failed to raise the status of his military retirement on his original appeal from the Interlocutory Judgment of Dissolution of Marriage, he waived any subsequent right to appeal the issue. We also note that the Interlocutory Judgment of Dissolution was entered November 15, 1978. His motion was filed December 12, 1979. Under Section 473 it was not timely filed.

On November 18, 1981, Appellant filed a complaint in the Monterey County Superior Court, Case Number 77562, against his trial lawyer, Mr. Bebermeyer, alleging malpractice.

II.

THE FEDERAL QUESTION SOUGHT TO BE REVIEWED WAS NOT TIMELY OR PROPERLY RAISED.

While Appellant's jurisdictional statement asserts that the Statute in issue is California Civil Code, Section 4800, it is obvious from his materials that it is not. The Appellant's frustration focuses primarily on California Code of Civil Procedure, Section 473, which in pertinent part provides:

> The Court may, upon such terms as may be just, relieve a party or his or her legal representative from a judgment, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for such relief must be accompanied by a copy of the answer or other

> pleading proposed to be filed therein, otherwise the application shall not be granted, and must be made within a reasonable time, in no case exceeding six months after such judgment, order, or proceeding was taken...(emphasis added)

A litigant must follow the procedures in raising federal questions. Any failure to do so is fatal to his chances for Supreme Court review. In Re Lampkin (1957), 355 U.S. 59, 78 S.Ct. 137, 2 L. Ed.2d 107; Ferguson v. Georgi (1961), 365 U.S. 570, 572, 81 S.Ct. 756, 5 L.Ed.2d 783. If reasonable state procedural requirements are not observed, this court will generally decline to exercise jurisdiction. Pennsylvania Railroad Company v. Illinois Brick Company (1935), 297 U.S. 447, 462-463, 56 S.Ct. 556, 80 L.Ed. 796; Eerie Railway Company v. Purdy (1901), 185 U.S. 148, 22 S.Ct. 605, 46 L.Ed. 847. Moreover, apart from the issue of timeli-

ness for purposes of Section 473, the fact that the propriety of the stipulation dividing Appellant's military pension was not raised on Appellant's first State Court appeal is a basis for dismissal of this appeal as well. Failure to follow the state appellate channel is fatal to the chances for Supreme Court review. The Appellant should be deemed to have waived the federal issue and there will be no basis for the assertion of the Court's jurisdiction. Herndon v. Georgia (1934), 295 U.S. 441, 443, 55 S.Ct. 794, 79 L.Ed. 1530; Beaty v. Richardson (1927), 276 U.S. 599, 48 S.Ct. 320, 72 L.Ed. 24.

III.

THE JUDGMENT RESTS ON ADEQUATE NONFEDERAL BASIS.

With respect to the military retirement, the Interlocutory Judgment was a stipulated judgment. In California, stipulations are contracts. Palmer v. Long Beach (1948), 33 Cal.2d 134, 142, 199 P.2d 952. Stipu-

lations are liberally construed so as to encourage and facilitate the settlement of controversy or of procedural disputes. Jackson v. Puget Sound Lumber Company (1898), 123 Cal. 97, 155 P.2d 788.

The State Statute which the Appellant purports to attack acknowledges the significance of stipulations in the disputes concerning marital property. California Civil Code, Section 4800, in part states:

> Except upon the written agreement of the parties, or on oral stipulation of the parties in open court, the court shall...divide the community property and quasi-community property of the parties... equally. (emphasis added)

Such a stipulation is the basis for the division of pension benefits in this case; yet, nowhere in his pleadings does the Appellant identify any federal basis to object to that portion of Section 4800(a) dealing with stipulations.

Section 4800(a) reflects a strong

State policy related to contracts for lawsuit settlement and a parallel interest to ensure that contractual obligations voluntarily undertaken cannot be avoided on irrelevant bases, such as a subsequent change in the law.

If a "change in the law" were a basis for rescission of contracts, a host of unjust consequences might result. For example, would an increase in legal interest rates permit a seller to rescind a fixed interest contract of sale with a buyer? Should a seller of property which subsequent to sale becomes subject to liberalized zoning requirements, be entitled to rescind on the basis of mistake?

It is exactly that type of unjust consequence which the Appellant seeks to impose upon the Appellee in this case.

It has been a longstanding proposition in California that laws enacted subsequent to the execution of an agreement are not

deemed to be part of the agreement and the parties are presumed to have had existing law in mind at the time of the agreement. Swenson v. File (1973), 3 Cal. 3d 389, 393, 90 C.R. 580, 475 P.2d 852.

In In Re Marriage of Mahone (1981), 123 Cal.App.3d 17, 176 C.R. 274, the Court stated:

> It does not follow, however, that Husband should be relieved of the trial stipulation by reason of the McCarty decision. The written stipulation was filed with the trial court January 5, 1978. As of that date it was settled California law that a federal military retirement pension was subject to division as community property, and the United States Supreme Court had not indicated to the contrary. (In Re Marriage of Fithian, 10 Cal.3d 592, 111 C.R. 369, 517 P.2d 449, cert. den., 419 U.S. 825, 95 S.Ct. 41, 42 L.Ed.2d 48 rehg. den. 419 U.S. 1060, 95 S.Ct. 644, 42 L.Ed.2d 657.) The stipulation was in accordance with the law as it then stood, and Husband is not entitled to relief from the stipulation

merely because the law was subsequently changed by judicial decision. (See Cooley v. County of Calaveras, 121 Cal. 482, 485-486, 53 P. 1075; Campbell v. Rainey, 172 Cal. App. 747, 749-750, 17 P.2d 310; Mitchel v. National Auto and Casualty Insurance Company, 38 Cal.App.3d 599, 603-605, 113 C.R. 391; Zeppi v. State of California, 203 Cal.App.2d 386, 388, 21 C.R. 534.

No clearer assertion of the law of the State of California and the adequacy of the state ground for decision can be found.

The Supreme Court has consistently adhered to the principle that it will not review a State Court judgment based on an adequate, independent, nonfederal state ground. Murdock v. Memphis (1874), 20 Wall 590, 636, 22 L.Ed. 429; Fox Film Corporation v. Muller (1935), 296 U.S. 207, 56 S.Ct. 183, 80 L.Ed. 158.

IV.

CONCLUSION

Appellant's suit against his trial

attorney demonstrates his conviction that the problem he alleges concerning the stipulated judgment in this case is to be resolved under State law. Appellant's Jurisdictional Statement is one more frivolous effort to evade the contractual responsibilities he undertook in open court on August 24, 1978. The Appellee respectfully moves the Court to dismiss this appeal, or in the alternative, to affirm the judgment entered in the cause by the Court of Appeal of California, First Appellate District, Division Three.

DATED: December 23, 1982.

Respectfully submitted,

HEISLER, STEWART & DANIELS, INC.

By_____
WILLIAM B. DANIELS

PROOF OF SERVICE BY MAIL

I, the undersigned, declare:

I am a citizen of the United States, employed in Monterey County, State of California. I am over the age of 18 years and not a party to the within cause. My business address is 563 Figueroa Street, Monterey, California, 93940. On December 23, 1982, I served the within MOTION OF APPELLEE, BARBARA LEE YATEMAN, TO DISMISS OR AFFIRM, on the parties named below, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Monterey, California, addressed as follows:

Clerk of the Court of Appeal
First Appellate District
Division Three
4154 State Building
Civic Center
San Francisco, CA 94102

Attorney General (3)
State of California
6000 State Building
San Francisco, CA 94102

Honorable Nat A. Agliano
Judge of the Superior Court
1200 Aguajito Road
Monterey, CA 93940

Sidney H. Yateman (3)
1031 Parkway Drive
Pebble Beach, CA 93953

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on December 23, 1982, at Monterey, California.

SARAH STERN

NOTE

The original documents of which the following are reproductions contained numerous typographical errors.

No effort has been made to correct them.

APPENDIX A

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF MONTEREY

BEFORE HONORABLE E. J. LEACH, JR., JUDGE

---o0o---

In Re the Marriage of	)	
	)	
Petitioner: BARBARA LEE YATEMAN,	)	No.
	)	
and	)	MDR
	)	
Respondent: SIDNEY HERSH YATEMAN.	)	10439
	)	

TRANSCRIPT OF PROCEEDINGS

Courthouse, Salinas, California

August 24, 1978

---o0o---

APPEARANCES:

For the Petitioner:	For the Respondent:
L. PATRICK PIGGOTT, Esq.	Reith,Wellington,and Bebermeyer, by ROBERT BEBERMEYER, Esq.

C.S.R. No. 995

BRAY & O'DALY
Certified Shorthand Reporters
Monterey County
Salinas,California

THE COURT: In the marriage of Yateman, this is the time for trial.

MR. BEBERMEYER: Ready for the respondent, Your Honor.

MR. PIGGOTT: Ready for the petitioner, Your Honor.

MR. BEBERMEYER: We have stipulated on certain matters, Your Honor, concerning some of the issues in the case. I would like to recite those for the purpose of the court record and for your information and edification.

MR. PIGGOTT: First we have agreed to stipulate it will be a closed hearing so that the children are outside and not involved. Is that correct?

MR. BEBERMEYER: That is correct.

THE COURT: All right.

MR. BEBERMEYER: The stipulated matters include the following: Number 1, related to child custody, that Jennifer

Helen Yateman, born March 5, 1962, aged sixteen, physical custody be awarded to respondent, Sidney Yateman, with reasonable rights of visitation to petitioner, Barbara Yateman. The child Jill Carli Yateman, born March 8, 1964, age fourteen, physical custody be awared to petitioner, Barbara Yateman, with reasonable rights of visitation to the respondent, Sidney Yateman.

The community property disposition is as follows: 1031 Parkway Drive, Pebble Beach, California is awared to the respondent Sidney Yateman. There has been an agreed fair market value of this residence at the time of trial of $140,000.00 and there are agreed encumbrances against said residence in the sum of $53,002.46. This figure leaves a net equity of $86,997.54. One half of that equity, of that net equity, which is the sum of $43,498.77 is to be paid by petitioner --

excuse me, to be paid by respondent Sidney Yateman, to the petitioner, Barbara Yateman at the time of entry of interlocutory decree.

MR. PIGGOTT: Well, we have stipulated she'll receive some but we are not insisting on immediate payment if that is going to hamper his ability to make support payments, is how the stipulation should state. We would agree that would be the sum of the community property division.

MR. BEBERMEYER: The military retirement of the respondent, Sidney Yateman. The following dates are pertinent for calculation of community interest therein. Mr. Yateman entered the service October 13, 1957; the date of marriage of the parties was June 14, 1959 and separation date of the parties is as alleged by petitioner, March 13 1968, and as alleged by respondent, February 25, 1978. There

is a difference of about three weeks time.

MR. PIGGOTT: You referred to that March date as '68, you meant '78.

MR. BEBERMEYER: Excuse me, '78, Your Honor.

MR. PIGGOTT: There is one problem with those dates, Your Honor. The retirement of Mr. Yateman is based on twenty years active duty service as an officer. He gradudated from military academy in June 1959, although he'll get credit as to the amount of retirement for those two years of National Guard active duty. They do not count on the years that he had to complete before he could retire towards the community property and we'll have to work out that exact percentage later and we would ask the court to reserve jurisdiction on that, but the date -- what was the exact date of graduation, do you know.

MR. YATEMAN: 3 June '59.

MR. PIGGOTT: 3 June '59 is the date

that should be used to calculate retirement and community property.

MR. BEBERMEYER: Our position is slightly to the contrary. We take into account the two years for pay purposes which will have totaled twenty two years and take the percentage thereof and we come out with 42.163 per cent being Mrs. Yateman's interest in the retirement when he does retire.

MR. PIGGOTT: With our's it becomes 46.875 per cent. We would ask the court to retain jurisdiction. I believe we will be able to work it out when we find out exactly how the army calculates it.

MR. BEBERMEYER: We have undeveloped real property in Wilton, Connecticut as listed on the pleadings. That property is to be sold at the earliest possible date and the net proceeds of the sale to be divided equally.

The respondent has agreed to con-

tinue to make the tax payments thereon and is to receive credit for all sums accruing after the entry of interlocutory decree.

The automobiles of the parties: the respondent is to receive the Mercury Station-wagon; the petitioner to receive the Volks-wagen automobile and we are agreed that the approximate value of those vehicles is $1,000 each.

The household goods and furnishings and jewelry of the parties has not yet been appraised and we will have that appraised and if possible divided pursuant to agree-ment of the parties. We ask the court to retain jurisdiction, if necessary, if equal division cannot be affected.

The insurance of the parties likewise, or the insurance of Mr. Yateman, we do not have an exact figure on the cash surrender value; it's somewhere between $1,500 and $4,000 and when that is determined the respondent will pay one half of the cash

value of that insurance to the petitioner, Mrs. Yateman. And there again we ask the court to retain jurisdiction to make a determination in that regard, if necessary.

MR. PIGGOTT: Mr. Bebermeyer will provide my office with statements from the different insurance companies as to the cash value.

MR. BEBERMEYER: As to the beneficiaries of said policies, the husband, Colonel Yateman, respondent, has agreed both daughters shall be beneficiaries of at least $10,000.00 worth of life insurance on his life until such time as the daughters reach the age of majority.

THE COURT: Total of ten.

MR. BEBERMEYER: Ten on each, Your Honor.

THE COURT: All right.

MR. BEBERMEYER: We have an item of several community debts which are still unresolved and we ask the court to retain

jurisdiction on those, one of which might ultimately be covered by the CHAMPIS program.

MR. PIGGOTT: Want to list them.

MR. BEBERMEYER: Dr. Crines, $720 -- $792. Dr. Stancil Johnson $161, and I believe -- is there a dental bill for one of the daughteres?

MR. PIGGOTT: We don't know of any outstanding dental bill but Colonel Yateman has it listed on his financial statement.

MR. YATEMAN: There's one for general surgery and one for Jill's retainer and positioner.

MR. PIGGOTT: Approximate total is $400.

MR. YATEMAN: Bobbie should know, the retainer positioner is probably $400 alone.

MR. BEBERMEYER: We have agreed there will be a mutual restraining orders from being in and about the residence of the

other except upon reasonable notice for visitation purposes and with permission. Telephone communication with the respective daughters be limited to the hours of eight a.m. to eight p.m.

The remaining issues as agreed to by the attornies include the issue of spousal support, child support. The maintenance -- number 2, the maintenance of the children on private insurance in the event, for any reason, the government should fail to cover dependents of retired personnel.

Number 3, the maintenance of any life insurance by the petitioner -- by the respondent for any support period awarded.

Number 4, the filing of the 1978 federal and state tax return be joint or singly and entitlement to deduction thereon.

Number 5, attorney's fees and court costs.

THE COURT: All right.

MR. BEBERMEYER: I think that covers it.

MR. PIGGOTT: Yes, We stipulate to what has been stated by Mr. Bebermeyer, that may be entered as part of the interlocutory order. Though those are the remaining issues, there's also the remaining issue of maintaining life insurance on Mrs. Yateman.

MR. BEBERMEYER: I mentioned that.

MR. PIGGOTT: Did you mention attorney's fees?

MR. BEBERMEYER: Yes, I did.

MR. PIGGOTT: That's what we are going to proceed on.

THE COURT: Call your first witness.

MR. PIGGOTT: I call Mrs. Yateman.

APPENDIX B

REITH, WELLINGTON & BEBERMEYER
Attorneys at Law
444 Pearl Street
Post Office Box 188
Monterey, California 93940
Telephone: 375-3181

Attorneys for Respondent

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF MONTEREY

In re the marriage of	) No.
	)
Petitioner: BARBARA LEE YATEMAN	) MDR 10439
	)
and	)
	)
Respondent: SIDNEY HERSH YATEMAN	)
	)

DECLARATION OF RESPONDENT, SIDNEY HERSH YATEMAN, UNDER PENALTY OF PERJURY IN SUPPORT OF MOTION TO SET ASIDE THAT PORTION OF INTERLOCUTORY AND FINAL DECREES IN WHICH JURISDICTION WAS RETAINED OVER MILITARY RETIREMENT BENEFITS BY CHARACTERIZING THEM AS COMMUNITY PROPERTY UNDER C.C.P. § 473

DECLARATION OF RESPONDENT
SIDNEY HERSH YATEMAN
UNDER PENALTY OF PERJURY

At the time of the dissolution hearing, a stipulation was entered into between the

the parties which enabled the court to retain jurisdiction over my military benefits and treated them as community property. (pages 2 and 3 - transcript of trial court proceedings) I was adamant that all military retirement benefits were my separate property and agreed to the stipulation only because at that time the California Supreme Court had held in Re Marriage of Fithian that such benefits were divisible because such division did not interfere in any way with the administration or goals of the federal military retirement pay system. Recent developments in the law and research has proven otherwise. I further detrimentally relied on the improper holdings of the California Courts that retirement benefits which had not yet vested at time of dissolution of marriage were also divisible, as expressed In Re Marriage of Brown. Again, recent developments in the law and

extensive research has indicated that such a holding is improper and that the California law dealing with military retirement benefits is void on its face because it interfers with the objectives or requirements of the federal retirement pay system. At the time of trial, no case of similar nature had been heard by the U.S. Supreme Court overruling the California decisions regarding the community property interpretation for retirement benefits. However, the California Supreme Court has been overruled subsequently in Hisquerdo v. Hisquerdo, 99 SCt 802, decided January 22, 1979. Also the enlightened California Second abstract Court of Appeal, using the holding in Hisquierdo, to include the fact that the California Courts had ignored recent legislation which clarifies the federal retirement pay system, ruled in Re Marriage of Milhan, 97 CalApp 3d 41 on September 19, 1979, that military retirement pay was sep-

arate property. Additionally, the same court said In Re the Marriage of Orr, 157 Cal.Rptr. 301 on July 30, 1979, that the California Supreme Court holding in Re Marriage of Stenquist was not the latest word on community interest in federal benefits. Accordingly, that portion of the stipulation entered into while these cited cases were pending with regard to retirement pay being community property and the courts retaining jurisdiction for division of same, is void on its face. At the very least, in the alternative, the California law, as currently defined, is mistated.

Also, it should be noted that I am not now nor ever have been a resident of California, that I am on active duty in the military service, and am subject to California jurisdiction only by virtue of my military assignment within the state.

On June 13, 1979, the dissolution of my marriage became final and this motion is within six months of that decree. During this time prior legislation has been clarified and new judicial holdings have been made which have a bearing on my case. Therefore, I request the court to vacate that portion of my inter-locutory and final decrees as relates to military retirement by deleting any reference to retention of jurisdiction by the court to divide future military retirement benefits as community property. Additionally, I request that the court modify said decrees by affirming that my military retirement benefits are my separate property.

I declare that the foregoing is true under penalty of perjury.

Dated: January 31, 1980

/s/ Sidney Hersh Yateman
Sidney Hersh Yateman

APPENDIX C

SIDNEY H. YATEMAN
1031 Parkway Drive
Pebble Beach, CA 93953
(408) 375-4221

FILED
Nov 18 8 55 AM'81
Ernest A.Maggini
Monterey County Clerk
/s/ Deputy

Plaintiff
In Pro Per

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF MONTEREY

SIDNEY H. YATEMAN, Plaintiff, vs. BLACK and RED CORP.; REITH, BEBERMEYER, & WIEBEN, ATTORNEYS AT LAW; DOES I through V, inclusive, Defendants.	No. 77562 COMPLAINT FOR DAMAGES FOR MALPRACTICE

Plaintiff SIDNEY H. YATEMAN, for cause of action, alleges as follows:

1. At all times mentioned herein, defendant ROBERT R. BEBERMEYER was and still is a resident of Monterey County, California.

2. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I through V, inclusive and there-

fore sues these defendants by such fictitious names. Plaintiff will amend this Complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is negligently responsible in some manner for the occurrences herein alleged, and that plaintiff's losses as herein alleged, were proximately caused by such negligence.) At all times herein mentioned, each of the above named defendants were the agents and employees of their co-defendants, and in doing the things herein alleged, were acting within the course and scope of such agency and employment.

3. At all times herein mentioned, Defendants ROBERT R. BEERMEYER was licensed to engage in the practice of law in the State of California and was practicing law at 444 Pearl Street, Mon-

terey, California.

4. On or about March, 1978, at Monterey, California, Plaintiff retained and employed defendant ROBERT R. BEBERMEYER to represent Plaintiff as Plaintiff's attorney at law in a proceeding for a dissolution of Plaintiff's marriage to BARBARA L. YATEMAN. At such time and place, Defendant accepted such employment and agreed to perform such services for Plaintiff. The above-mentioned proceeding resulted in an interlocutory judgment of divorce on November 15, 1978 and a final judgment of dissolution entered June 13, 1979 in Monterey Superior Court, Case No. 10439. Copies of the interlocutory judgment of divorce and the final judgment of dissolution are attached hereto as Exhibits "A" and "B" respectively. At all times after Plaintiff retained Defendant to represent him in the above-mentioned proceeding, Defendants and each

of them, failed to exercise reasonable care and skill in undertaking to perform such legal services for plaintiff and negligently and carelessly failed to assert plaintiff's separate property interest in his future military pension rights as Plaintiff requested be done. Plaintiff will retire from the Army in 1982 after twenty-three years of Active Duty service and two years of National Guard Service. Plaintiff alleges that his pension payments due to his service in the Army are approximately $1,962.00 a month beginning upon retirement in June 1982. By substantially prejudicing the rights of Plaintiff when defendant insisted that military retirement benefits were community property in the dissolution proceedings, Plaintiff will be required to divide these benefits with his ex-spouse.

5. Defendant negligently failed to

accept the fundamental principle and ethical consideration that the authority to make decisions on the merits of the cause or with regard to the rights of the client is exclusively that of the client (Plaintiff) and if made within the framework of the law, such decisions are binding on the lawyer (Defendant). As a result defendant failed to include plaintiff's future military benefits as separate property in the pleadings, settlement discussions, or settlement agreement but stipulated that such future military benefits were community property and that the court should retain jurisdiction over them.

6. Had defendants exercised proper care and skill in the foregoing matter, plaintiff would receive all of his military pension payments as separate property.

7. As a proximate result of such neg-

ligence by defendants, plaintiff will lose a portion of the military benefits, all to plaintiff's damage in the sum to be shown according to proof.

8. Defendant further was negligent in the manner in which he proceeded with new information provided to him by Plaintiff. When plaintiff became aware of recent development in the law (within six months of the final decree) and insisted that it be used to set aside the portion of the final decree in which jurisdiction was retained over military retirement benefits and in which they had been characterized as community property, defendant advised plaintiff that the appropriate vehicle to present it to the court was by use of CCP 473. Defendant failed to advise plaintiff that a separate evidentiary hearing would have shown that the stipulation was a sham. Defendant further was negligent when he changed sentences in

Plaintiff's statement filed on December 12, 1979 which removed the comments referring to defendants failure to file as separate property originally and substituted words which by-passed that issue.

9. As a proximate result of plaintiff's reliance on statements and representations made to him by defendant, and as a proximate result of confidence and trust reposed by plaintiff in defendant, plaintiff failed to seek any other legal advice regarding the division of future military befefits between the plaintiff and his former wife. At no time either prior to or subsequent to plaintiff's final decree did defendant or any agent of defendant inform plaintiff that plaintiff had a full claim to future military benefits or even a right to claim them until plaintiff insisted that something be done. It was not until October 15, 1981, when plaintiff was told by competent judicial authority that the facts

related above were a matter between client and attorney and not for the courts to resolve with regard to separate property. It became apparent that the stipulation for community property should not have been included in the property settlement agreement. At that time plaintiff discovered the negligence of defendant as set forth herein. Hence, plaintiff's failure to ascertain or discover the negligence of defendant was not due to any lack of diligence on the plaintiff's part.

WHEREFORE, Plaintiff prays judgment against defendants as follows:

1. For damages in an amount to conform to proof;

2. For cost of suit herein incurred;

3. For such other and further relief as the Court may deem proper.

Dated: November 16, 1981

/s/ Sidney H. Yateman

SIDNEY H. YATEMAN

PATRICK PIGGOTT
Attorney at Law
P. O. Box 6448
Carmel, CA 93921
Telephone: (408) 625-0911

FILED
Nov 15 4 35 PM'78
MONTEREY OFFICE
ERNEST A MAGGINI
COUNTY CLERK

Attorney(s) for Petitioner

SUPERIOR COURT OF CALIFORNIA
COUNTY OF MONTEREY

In re the marriage of	) CASE
	) NUMBER
Petitioner: BARBARA LEE YATEMAN	) MDR 10439
	) NOTICE
and	) OF ENTRY
	) OF JUDG-
Respondent: SIDNEY HERSH YATEMAN	) MENT
	) (MARRIAGE)

You are notified that the following judgment in this cause was entered on NOV 15 1978

( ) Pursuant to Section 668.5 of the Code of Civil Procedure

(X) Judgment Book No. 19, Page 904

(XX) Interlocutory Judgment of Dissolution

( ) Final Judgment of Dissolution of Marriage

( ) Final Judgment of Legal Separation

( ) Final Judgment of Nullity

( ) Order on OSC or Motion

( ) Modification

( )

ERNEST A MAGGINI, CLERK

By RICHARD PETTER, Deputy

DECLARATION OF MAILING

On the date stated below, I mailed (by first-class mail or airmail, postage prepaid) a copy of this Notice of Entry of Judgment (Marriage) to the persons entitled thereto, addressed as follows:

BARBARA LEE YATEMAN
c/o Patrick Piggott
P. O. Box 6448
Carmel, Ca.93921

SIDNEY HERSH YATEMAN
c/o Robert Bebermeyer
P. O. Box 188
Monterey, Ca. 93940

Dated NOV 15 1978

ERNEST A MAGGINI,
CLERK

By RICHARD PETTER,
Deputy

NOTICE OF ENTRY OF JUDGMENT (MARRIAGE)

EXHIBIT A

PATRICK PIGGOTT
Attorney at Law
P. O. Box 6448
Carmel, Ca. 93921
Telephone: (408) 6250-0911

ENTERED
NOV. 15, 1978

Attorney(s) for Petitioner

SUPERIOR COURT OF CALIFORNIA
COUNTY OF MONTEREY

In re the marriage of	)CASE
	)NUMBER
Petitioner: BARBARA LEE YATEMAN	)MDR 10439
	)INTERLOCU-
and	)TORY JUDG-
	)MENT OF
Respondent: SIDNEY HERSH YATEMAN	)DISSOLU-
	)TION OF
	MARRIAGE

This proceeding was heard on 8-24-78 before the Honorable E. J. LEACH, Department No. _____.

The court acquired jurisdiction of the respondent on 3-13-78 by:

( ) Service of process on that date, respondent not having appeared within the time permitted by law.

(X) Service of process on that date and respondent having appeared.

( ) Respondent on that date having appeared.

The court orders that an interlocutory judgment be entered declaring that the parties are entitled to have their marriage dissolved. This interlocutory judgment does not consitute a final dissolution of marriage and the parties are still married and will be, and neither party may remarry, until a final judgment of dissolution is entered.

The court also orders that, unless both parties file their consent to a dismissal of this proceeding, a final judgment of dissolution be entered upon proper application of either party or on the court's own motion after the expiration of at least six months from the date the court acquired jurisdiction of the respondent. The final judgment shall include such other and further relief as may be necessary to a complete disposition of this proceeding, but entry of the final judgment shall not deprive this court of its jurisdiction over any matter expressly reserved to it in this or the final judgment until a final disposition is made of each such matter.

The Court further orders both parties to carry out the following terms and provisions of this Interlocutory Judgment:

1. Physical custody of daughter JENNIFER YATEMAN born March 5, 1962, is awarded respondent with reasonable rights of visitation to petitioner.

2. Physical custody of daughter JILL YATEMAN, born March 8, 1964, is awarded petitioner with reasonable rights of visitation to respondent.

3. Respondent receives the Mercury station wagon as sole property while petitioner receives the Volkswagon sedan and both parties agree the value is approximately equal.

4. The real property located in Wilton, Connecticut, shall be placed on the market and sold with the proceeds divided equally between respondent and petitioner. Respondent shall continue to make all tax payments thereon and shall receive credit on such payments at time of sale.

5. Respondent shall maintain a minimum of $10,000.00 life insurance with each daughter as beneficiary until each daughter reaches the age of majority.

6. Each party will pay their own attorney's fees.

7. Respondent shall pay to petitioner child support in the sum of $200.00 per month, beginning September 1, 1978 and payable on the first day of each month until daughter JILL reaches the age of eighteen (18) or is sooner emancipated or deceased.

8. Respondent shall pay to petitioner spousal support in the sum of $550.00 per month, beginning September 1, 1978, and payable on the first day of each month thereafter for the reasonable term of four (4) years, at which time the payment becomes $250.00 per month. Spousal support shall cease upon death of either party or remarriage of petitioner.

9. The communtiy property home located at 1031 Parkway Drive, Pebble Beach, California, is valued at fair market value of $140,000.00 against which exists

encumbrances of $53,002.46. The equity is, therefore, $86,997.54. Respondent shall retain the home as his sole and separate property and pay petitioner one-half (1/2) the equity, i.e. the sum of $43,498.77.

10. Respondent's military retirement is community property but at a presently undetermined amount. Petitioner shall be entitled to receive one-half of respondent's military retirement directly attributable to the years of marriage, June 14, 1959 until separation occuring sometime between February 25, 1978 and March 13, 1978. The question remains as to when respondent's military time commenced for retirement purposes, October 13, 1957 (entry date) or June 3, 1959 (graduation from West Point). The exact calculations are left to the parties subject to this court's continued jurisdiction to establish the exact figures should the parties be unable to do so at the time retirement commences.

11. Household goods, furnishings, jewelry and all community property, personal property remaining in possession of respondent shall be appraised and divided equally. The court shall retain jurisdiction over this matter.

12. Respondent shall continue to reside in a $140,000.00 home and send daughter JENNIFER to the private school, Robert Louis Stevenson.

13. The outstanding cash value of insurance policies shall be determined as soon as possible and respondent shall pay one-half (1/2) of said cash value to petitioner.

14. Both parties are restrained from being in and about the residence of the other except upon reasonable notice for visitation purposes and with permission. Telephone communication with the respective daughters is limited to the hours of 8:00 a.m. and 8:00 p.m.

Any issue left unresolved in this Order shall remain within the jurisdiction of the court.

DATED: NOV 15, 1978

E. J. LEACH
JUDGE OF THE SUPERIOR COURT

REITH, WELLINGTON &
BEBERMEYER
Attorneys at Law
444 Pearl Street
Post Office Box 188
Monterey, California
93940
Telephone: 375-3181

FILED
JUN 13 10 03 AM '79
MONTEREY OFFICE
ERNEST A. MAGGINI
COUNTY CLERK
DEPUTY

Attorney(s) for
Respondent

SUPERIOR COURT OF CALIFORNIA
COUNTY OF MONTEREY

In re the marriage of	) CASE NUMBER
	) MDR 10439
Petitioner:	)
	) NOTICE OF
BARBARA LEE YATEMAN	) ENTRY OF
	) JUDGMENT
and	) (MARRIAGE)
	)
Respondent:	)
	)
SIDNEY HERSH YATEMAN	)
	)

You are notified that the following judgment in this cause was entered on JUN 13 1979

( ) Pursuant to Section 668.5 of the Code of Civil Procedure

(X) Judgment Book No. 21, Page 605

( ) Interlocutory Judgment of Dissolution of Marriage

(X) Final Judgment of Dissolution of

of Marriage

( ) Final Judgment of Legal Separation

( ) Final Judgment of Nullity

( ) Order on OSC or Motion

( ) Modification

( )

ERNEST A. MAGGINI, CLERK

By LISA G. EISEMANN, Deputy

DECLARATION OF MAILING

On the date stated below, I mailed (by first-class mail or airmail, postage prepaid) a copy of this Notice of Entry of Judgment (Marriage) to the persons entitled thereto, addressed as follows:

REITH,WELLINGTON
& BEBERMEYER
P. O. Box 188
Monterey, CA 93940

PATRICK PIGGOTT
Attorney at Law
P. O. Box 6448
Carmel, CA 93921

Dated JUN 13 1979

ERNEST A. MAGGINI,
CLERK

By LISA G. EISEMANN,
Deputy

NOTICE OF ENTRY OF JUDGMENT (MARRIAGE)
EXHIBIT B

REITH,WELLINGTON
& BEBERMEYER
Attorneys at Law
444 Pearl Street
Post Office Box 188
Monterey, California
93940
Telephone: 375-3181

Attorney(s) for
Respondent

FILED
JUN 12 2 42 PM'79
MONTEREY OFFICE
ERNEST A. MAGGINI
COUNTY CLERK
DEPUTY /s/
Lisa G. Gsemann
ENTERED
REEL 21 PAGE 605
JUN 13 10 02 AM'79
MONTEREY OFFICE
ERNEST A. MAGGINI
COUNTY CLERK
DEPUTY /s/
D.Duncan

SUPERIOR COURT OF CALIFORNIA
COUNTY OF MONTEREY

In re the marriage of	)CASE NUMBER
	)MDR 10439
Petitioner:	)FINAL JUDGMENT
	)(MARRIAGE) OF
BARBARA LEE YATEMAN	)DISSOLUTION
	)
and	)
	)
Respondent:	)
	)
SIDNEY HERSH YATEMAN	)

The court acquired jurisdiction of the respondent on April 13, 1978 by:

( ) Service of process on that date, respondent not having appeared within the time permitted by law.

( ) Service of process on that date and

respondent having appeared.

(x) Respondent on that date having appeared.

The court orders that:

( ) Pursuant to ( ) Civil Code Section 4506(1) or ( ) Civil Code Section 4506(2), a Judgment of Legal Separation and such other orders as are set out below be entered.

( ) Pursuant to ( ) Civil Code Section 4400, ( ) Civil Code Section 4401, or ( ) Civil Code Section 4425 ( ), a Judgment of Nullity and such other orders as are set out below be entered, and that the parties be restored to the status of unmarried persons.

(x) Pursuant to (x) Civil Code Section 4506 (1) or ( ) Civil Code Section 4506 (2), a Final Judgment of Dissolution be entered, and that all of the provisions of the interlocutory

judgment, which was entered on Nov. 15, 1978, except as otherwise set out below, be made binding the same as if set forth in full, and that the parties be restored to the status of unmarried persons.

Dated JUN 12 1979

/s/ Ralph Drummond
RALPH M. DRUMMOND
Judge of the Superior Court

APPENDIX D

STATUTES INVOLVED

California Civil Code §4800(a):

> Except upon the written agreement of the parties, or on oral stipulation of the parties in open court, the court shall, either in its interlocutory judgment of dissolution of the marriage, in its judgment decreeing the legal separation of the parties, or at a later time if it expressly reserves jurisdiction to make such a property division, divide the community property and the quasi-community property of the parties, including any such property from which a homestead has been selected, equally. For purposes of making such division, the court shall value the assets and liabilities as near as practicable to the time of trial, except that, upon 30 days' notice by the moving party to the other party, the court for good cause shown may value all or any portion of the assets and liabilities at a date after separation and prior to trial to accomplish an equal division of the community property and the quasi-community property of the parties in an equitable manner.

Code of Civil Procedure §473:

AMENDMENTS PERMITTED BY COURT; ENLARGEMENT OF TIME TO ANSWER OR DEMUR; CONTINUANCE, COSTS; RELIEF FROM JUDGMENT, ETC., TAKEN BY MISTAKE, INADVERTENCE, SURPRISE, OR EXCUSABLE NEGLECT; CLERICAL MISTAKES IN JUDGMENT OR ORDER; VACATING VOID JUDGMENT OR ORDER

ALLOWABLE AMENDMENTS

The court may, in furtherance of of justice, and on such terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect; and may, upon like terms, enlarge the time for answer or demurrer. The court may likewise, in its discretion, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding in other particulars; and may upon like terms allow an answer to be made after the time limited by this code.

CONTINUANCE

When it appears to the satisfaction of the court that such amendment renders it necessary, the court may postpone the trial, and may, when such postponement will by the amendment be rendered necessary, require, as a condition to the amendment, the payment to the adverse party of such costs as may be just.

RELIEF FROM JUDGMENT OR ORDER TAKEN BY MISTAKE, ETC.

The court may, upon such terms as may be just, relieve a party or his or her legal representative from a judgment, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise or excusable neglect. Application for such relief must be accompanied by a

copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and must be made within a reasonable time, in no case exceeding six months, after such judgment, order or proceeding was taken; provided, however, that, in the case of a judgment, order or other proceeding determining the ownership or right to possession of real or personal property, without extending said six months period, when a notice in writing is personally served within the State of California both upon the party against whom the judgment, order or other proceeding has been taken, and upon his or her attorney of record, if any, notifying said party and his or her attorney of record, if any, that such order, judgment or other proceeding was taken against him or her and that any rights said party has to apply for relief under the provisions of Section 473 of the Code of Civil Procedure shall expire 90 days after service of said notice, then such application must be made within 90 days after service of such notice upon the defaulting party or his or her attorney of record, if any, whichever service shall be later. No affidavit or declaration of merits shall be required of the moving party.

CLERICAL MISTAKES; VACATING VOID JUDGMENT OR ORDER

The court may, upon motion of the injured party, or its own motion, correct clerical mistakes in its

judgment or orders as entered, so as to conform to the judgment or order directed, and may, on motion of either party after notice to the other party, set aside any void judgment or order.

Supreme Court, U.S.
FILED
JAN 3 1983
ALEXANDER L. STEVAS
CLERK

No. 82-646

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

SIDNEY HERSH YATEMAN, APPELLANT

v.

BARBARA LEE YATEMAN, APPELLEE

ON APPEAL FROM THE COURT OF APPEAL

OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION THREE

MOTION OF APPELLANT OPPOSING APPELLEE'S MOTION TO DISMISS OR AFFIRM

SIDNEY H. YATEMAN
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IN PROPRIA PERSONA

DECEMBER 29, 1982

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 82-646

SIDNEY HERSH YATEMAN, APPELLANT

v.

BARBARA LEE YATEMAN, APPELLEE

ON APPEAL FROM
THE COURT OF APPEAL OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION THREE

MOTION OF APPELLANT OPPOSING
APPELLEES MOTION TO DISMISS OR AFFIRM

The Appellant moves that the Court oppose Appellee's motion to dismiss the appeal herein and to oppose in the alternative to affirm the judgment of the Court of Appeal of California on the grounds that: (1) the federal question sought to be reviewed was timely and properly raised and was not considered or discussed by the Court; and (2) that the judgment does not rest on an adequate nonfederal basis.

BASES FOR THE MOTION

I. No Voluntary Stipulation was made by Appellant nor was authorization given by Appellant for his attorney to enter into a stipulation involving Military Compensation.

II. Appellant's Affidavit filed in December, 1979 to set aside the Interlocutory Judgment was altered by his attorney when attorney removed incriminating comments about the attorney and then reworded the affidavit to read as submitted.

TABLE OF CONTENTS

Motion..... 1

Bases for the Motion..... ii

Table of Contents.....iii

Table of Authorities..... iv

NO VOLUNTARY STIPULATION WAS MADE BY APPELLANT NOR WAS AUTHORIZATION GIVEN BY APPELLANT FOR HIS ATTORNEY TO ENTER INTO A STIPULATION INVOLVING MILITARY COMPENSATION..... 1

APPELLANTS AFFIDAVIT FILED IN DECEMBER 1979 WITH A MOTION TO SET ASIDE THE INTERLOCUTORY JUDGMENT WAS ALTERED BY HIS ATTORNEY WHEN ATTORNEY REMOVED INCRIMINATING COMMENTS ABOUT THE ATTORNEY AND THEN REWORDED THE AFFIDAVIT TO READ AS SUBMITTED..... 9

CONCLUSION..... 10

Proof of Service by Mail..... 11

TABLE OF AUTHORITIES

CASES CITED:

In Re Marriage of Milhan II
97 Cal. App. 3d 41 (1979) - - - - - - - - - 6.7

McCarty v McCarty
453 U.S. _____, 101 S. Ct, 2728 (1981) - - - 6

STATUTES CITED

California Code of Civil Procedure §473 - - 8

I

NO VOLUNTARY STIPULATION WAS MADE BY APPELLANT NOR WAS AUTHORIZATION GIVEN BY APPELLANT FOR HIS ATTORNEY TO ENTER INTO A STIPULATION INVOLVING MILITARY COMPENSATION.

Appellee has referred to and argued Appellant's malpractice case against his attorney in her motion to dismiss or affirm. Appellant recognizes that the issue of malpractice is separate and apart from this case and not before the Court. However, since Appellee has raised this issue, Appellant must clarify the erroneous impression created by Appellee.

The Court is directed to the Jurisdictional Statement in which part F of the Questions are Substantial is found on pages 38-44. It should be further noted that the specific events included the following; all of which have been presented to and ignored by both the State Appellate and Supreme Courts.

Chronologically, the events occurred as follows:

A. At the time that the attorney of

record was engaged to respond to petitioner's petition for dissolution in California, appellant had already served petitioner with a similar petition from their home state of Florida. The Florida petition was intended to preserve appellant's separate property rights when petitioner deserted appellant.

B. The Florida case was dropped with the assistance of the previous attorney of record but with the understanding that all military entitlements would be claimed as separate property in California.

C. The initial financial declaration of March 24, 1978, specifically excluded military entitlements from the community property assets. This was filed with the trial court on April 13, 1978 but was not made a part of the Clerk's Transcript before the Appellate Court. A copy was attached to Appellant's Petition for Rehearing as Exhibit A.

D. The Court of Appeal noted in its decision that a stipulation was entered into by appellant on military entitlements. Such

is not the case. On or about April 12, 1978, appellant was called by attorney of record to come to his office. Upon arrival, appellant was presented with a Response (Marriage) form upon which was added (in type out of alignment with other entries) to the previous version "9. Potential partial community interest in Respondent's military retirement." That document was also not made a part of the Clerk's Transcript. A copy was provided in Appellant's Petition for Rehearing as Exhibit B. Appellant refused to sign it at which time attorney insisted. When Appellant further refused and asked why he had to do so, attorney became flushed, pounded his fist on the desk and stated "It's the law." Appellant stated "the law in this matter is wrong, the military entitlements are intended solely for the service member, and the law should be changed." Attorney stated that Appellant had to sign this document. Appellant was led to believe that to not sign the response would be illegal. Attorney's actions amounted to duress

especially in light of the emotional state of Appellant at that time. Appellant told attorney that even if he was forced to sign it the way it was presented by attorney, Appellant would not pay it and would take the case to the U. S. Supreme Court so that California would recognize the separate property nature of military entitlements. Appellant gave no authorization for a stipulation on this matter.

E. On June 20, 1978 and August 2, 1978, Appellant was required to amend his financial declarations by attorney when Appellant had child custody. Copies were provided as part of the Petition for Rehearing as Exhibits C and D. On August 22, 1978, prior to trial, Appellant was again required to amend his financial declaration by attorney. On each of these three (3) occasions Appellant refused to agree that military entitlements were community property and stated to attorney "I don't know why I have to do this when I am so much in disagreement with it." Each time attorney would gaze at Appellant and either

shrug his shoulders or say "it's the law." Appellant told attorney on each occasion that even if he had to sign the paper he did not agree to divide his military entitlements and would never do so.

F. During the period in which the above mentioned financial declarations were amended, petitioner submitted her financial declaration on August 3, 1978 in which no community property interest was stated for military benefits. Whatever stipulation was entered between petitioner's and appellant's attorneys, it was done so without knowledge of or authorization from appellant. The first indication that appellant had that such a stipulation was being made was at trial in open court.

G. At trial on August 24, 1978, attorney entered into a stipulation in open court which included military entitlements. Appellant did not authorize such a stipulation but found himself cut off at every attempt to oppose it when he passed notes to attorney.

H. The Court of Appeal noted that the appeal from paragraph 10 of the interlocutory judgment of dissolution of marriage was not made when other appealable areas were appealed. The fact of the matter is that appellant requested that it be included in the appeal since it was not what he had agreed to but attorney said it could not be done since it was the law in California. Appellant objected to the community property classification verbally to attorney on several dozen occasions from April 13, 1978 and throughout the first appeal. Several other issues were appealed by appellant on lesser important matters. Appellant did request that the military retirement issue be appealed also since it was his intent to do so long before he ever heard of Milhan or McCarty.

I. All of the above took place in an environment of appellant's battalion command duties, a probation study, house and property disposition, and family disruption. Appellant depended totally on attorney to

carry out his requests. Attorney recently stated that he had taken the actions he did because he though appellant was stubborn, trying to make law, and would incur excessive attorney fees in the process. (In fact, attorney fees amount to approximately $19,000.00 since appeals were submitted by appellant anyway). However, ethical consideration 7-7 of the Model Code of Professional Responsibility published by the American BAR Association states that "the authority to make decisions is exclusively that of the client and if made within the framework of the law, such decisions are binding on his lawyer." In this case appellant never waivered from characterizing his military entitlements as separate property. Appellant made no agreement to the contrary and did not authorize such a stipulation.

J. After the decision In Re Marriage of Milhan II (1979) 97 Cal. App. 3d 41, appellant became aware that it was not illegal to claim separate property on

military entitlements. Appellant obtained briefs from Commander Milhan and requested that appellant's attorney again correct the matter of stipulation. Attorney decided to use California Code of Civil Procedure Section 473 to submit the material provided to him by appellant. At this time appellant had entered law school and was selected for War College corresponding studies in addition to his regular duties. Appellant depended on attorney for the correctness of Section 473 applicability in lieu of some other procedure such as a collateral attack with an evidentiary hearing. Such a hearing would have revealed the facts stated above and would have reflected poorly on attorney. Use of the C.C.P. Section 473 negated a separate evidentiary hearing. The briefs from Commander Milhan were obtained after his DCA decision in September 1979 but appellant's attorney did not file a motion using the information until December 12, 1979, several weeks after the appellant's first appeal decision was rendered on November 29, 1979.

II

APPELLANTS AFFIDAVIT FILED IN DECEMBER 1979 WITH A MOTION TO SET ASIDE THE INTERLOCUTORY JUDGMENT WAS ALTERED BY HIS ATTORNEY WHEN ATTORNEY REMOVED INCRIMINATING COMMENTS ABOUT THE ATTORNEY AND THEN REWORDED THE AFFIDAVIT TO READ AS SUBMITTED.

Appellant's statement as originally written by him as part of the motion to set aside the stipulation stated that attorney did not permit a separate property classification of military entitlements as mentioned above. It was rewritten by attorney to read as it was submitted by removing that and other facts. Appellant was not aware that attorney was attempting to conceal facts which would reflect on his fraudulently entering into a stipulation which appellant did not authorize and adamantly opposed.

Attorney of record acknowledged to the Court of Appeal in both Supplemental Points and Authorities submitted on April 19, 1982 and in oral argument that appellant did not voluntarily stipulate to the paragraph 10 of the interlocutory decree and that appellant

said all along that he would not pay it. However, attorney's discussion is a faint effort and barely touches on the totality of the events which led to the stipulation fraudulently made by attorney.

Appellant's malpractice case mentioned by appellee for injury caused by attorney has no bearing on the merits of the federal issues in this appeal.

CONCLUSION

There is thus pending before this Court an appeal that timely challenges the characterization of military retired compensation as community property and exposes the failure of the State Courts to address the Federal issues. Accordingly, the Appellee's motion to dismiss or affirm should be denied.

Respectfully Submitted,

SIDNEY H. YATEMAN
1031 PARKWAY DRIVE
PEBBLE BEACH, CA 93953

December 29, 1982 _____
IN PROPRIA PERSONA

DECLARATION OF MAILING

I, the undersigned, declare:

I am a citizen of the United States, employed in Monterey County, State of California, over the age of 18 years, and not a party to the above-entitled cause. My address is Fremont Professional Center, Seaside, CA 93955. I served the foregoing document by depositing a true copy thereof in the United States mails in Seaside, State of California, on December 30, 1982, enclosed in a sealed envelope with the postage thereon fully prepaid, addressed as follows:

Clerk of the First Appellate District
Division Three
350 McAllister Street
San Francisco, CA 94102

Attorney General (3)
State of California
6000 State Building
San Francisco, CA 94102

Honorable Nat A. Agliano
Judge of the Superior Court
Monterey County Courthouse
Post Office Box 1819
Salinas, CA 93902

William B. Daniels Esq., (3)
Attorney at Law
563 Figuero Street
Monterey, CA 93940

Executed on December 30, 1982 at Seaside, California.

I declare under penalty of perjury that the foregoing is true and correct.

Saul M. Weingarten